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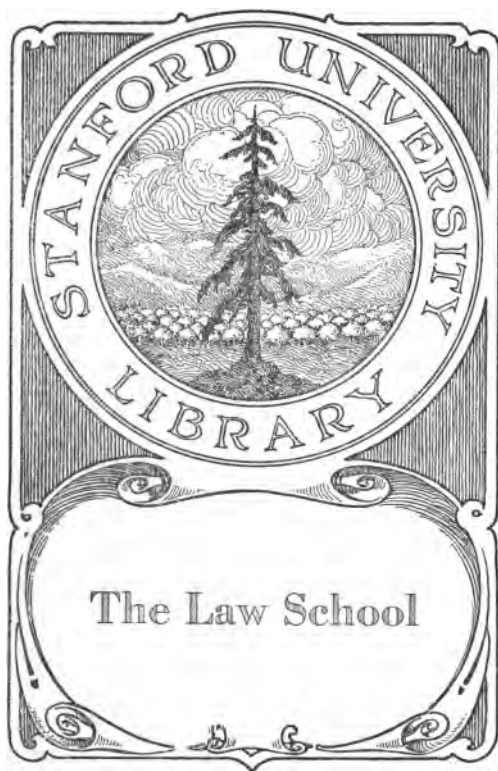
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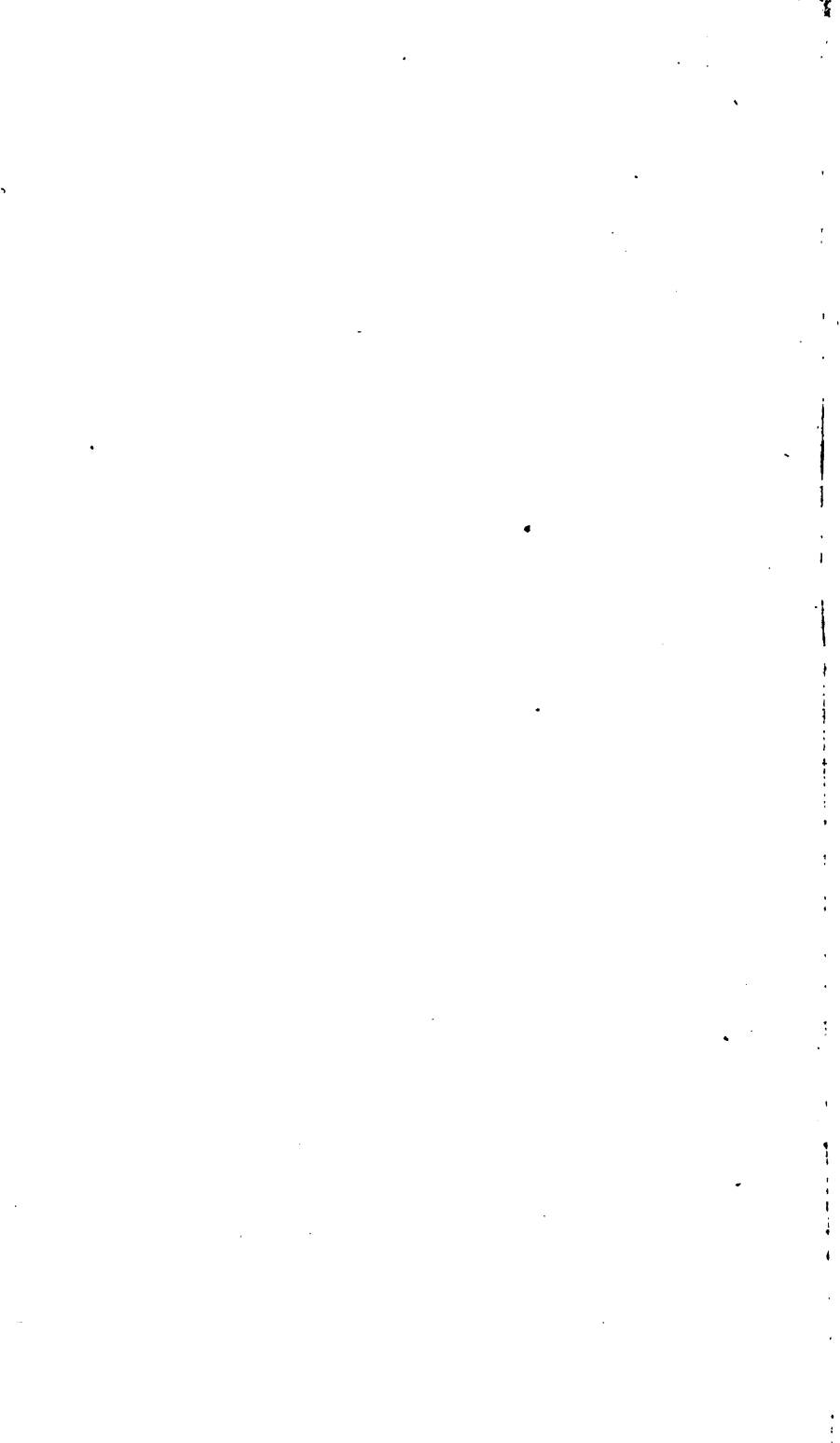
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THE
POSTHUMOUS WORKS

OF 1970

CHARLES FEARNE, Esquire,
BARRISTER AT LAW.

CONSISTING OF

A READING on the STATUTE of INROLMENTS,
ARGUMENTS in the singular Case of General STANWIX,

AND

A Collection of CASES and OPINIONS.

SELECTED FROM THE AUTHOR'S MANUSCRIPTS
By THOMAS MITCHELL SHADWELL,
OF GRAY'S-INN, ESQUIRE.

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LORD HIGH CHANCELLOR
OF GREAT BRITAIN;

THE FOLLOWING
POSTHUMOUS WORKS
OF
CHARLES FEARNE, ESQUIRE,
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REMAINDERS AND EXECUTORY DEVICES,
&c. &c.

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OF THE STATE OF
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IN SENATE
JANUARY 1, 1901

REPORT OF THE
COMMISSIONER OF THE LAND OFFICE

FOR THE YEAR
1900

ALBANY:

1901

P R E F A C E.

THE established character of the Author of the following sheets, and the high patronage under which they are introduced to the Profession, would render any attempt at further recommendation on the part of the Editor as vain, as it is unnecessary. For him, therefore, little remains but to give the Reader some account of the several pieces which compose this volume.

The Reading on the Statute of 27 *Hen.* 8. of Inrolments of Bargains and Sales, is probably as complete as the Author could make it: It was delivered by himself before a learned Society; and that he saw no sufficient reason to alter his opinion of the principles there laid down, appears in some very late instances, wherein his attention was called to the subject of that Reading, in the course of professional practice.

The Arguments in the Case of the Representatives of General *Stanwix* and his daughter, were never shewn by the Author but to a few select friends: They are inserted in this collection, as well on account of the singularity of the case, as of the ingenious nature of the arguments themselves. The Editor has not met with any report of the case, except that in 1 Sir *W. Bl.* 640; and which is noticed in Mr. *Christian's* edition of the Commentaries, vol. 2. p. 516. The substance of what is given in the Note to these arguments, was collected from a periodical publication.

The Opinions make up the chief part of the Work, and are selected from amongst a great number, the Editor avoiding the insertion of such as might, by publication, be productive of any inconvenience to the parties concerned: Those he has admitted, are mostly on general points; and all dates, names, descriptions, and all references to persons and places, or to the property of individuals, have been carefully altered or omitted.

The

P R E F A C E.

ix

The title of each Opinion, for the most part, (particularly where no case is prefixed,) contains the chief subject, combined with the turn of the Author's opinion upon it, and is only a short abstract of the Opinion.

As to any defects or inaccuracies, and no doubt there are some with which the Editor may be thought chargeable, he begs leave to offer in extenuation, that the hours devoted to this compilation were stolen from the exercise of profitable employment, solely for the satisfaction of endeavouring to serve a very deserving lady, the widow of one who was the guardian of his infancy, and had honoured him with the most intimate friendship: He feels it however incumbent on him to add, that, throughout the whole of this work, he is indebted, for very able assistance, to a gentleman, formerly a pupil and friend of the Author's, whose name he should be proud to mention.

THOMAS MITCHELL SHADWELL.

GRAY'S-INN-SQUARE,

Dec. 1796.

Mrs.

*Mrs. FEARNE most respectfully presents her
grateful acknowledgments to the Subscribers, for
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E R R A T A.

Page 27. line 10. *for hereditamens read hereditaments.*

134. — 11. *for devisees read devisees.*

169. — 14. *for on his note read in his note.*

408. — penult. *for vender read vendor.*

414. — 8. *for informing read inforcing.*

443. — 10. *after do add not.*

In the INDEX.

Line 10 of title "Bankrupt," *for and on read by merging.*

1 of title "Conveyance," *after of a reversion in fee add*
inrolment necessary.

7 of title "Copyhold," *for sine due read fine due.*

3 of title "Heir," *after sons add not absolutely barrable*
by their joining in a fine.

1 of title "Infant," *for partition read petition.*

1 of title "Life Estate," *for in a reversion in fee*
merged read merged in a reversion in fee.

3 of title "Parcels," *omit Presentation.*

3 of title "Reversion," *for mortgaged read merged.*
After assignees of bankrupt add bars contingent
remainder.

OBSERVATIONS
ON THE
STATUTE OF INROLLMENTS
OF
BARGAINS AND SALES,
27th *HENRY VIII.*

Delivered by the Author in a READING at LYON'S-INN
in the Year 1778.

A
R E A D I N G
ON THE
STATUTE OF INROLLMENTS,
27th *HENRY* VIII.

GENTLEMEN,

I DO not know any more proper way of expressing my sense of the honour I experience, in being elected a Reader to this Society, than by endeavouring to fulfil the office of that appointment to the best of my abilities.

This I propose to do in the following discourse, wherein it is my professed design, so far as the extent of my judgment and the nature of those materials which fall within the confined limits of my observation enable me, equally to avoid the parade of obsolete erudition, and the impertinence of trifling futility. Both are alike foreign to the end of that institution under which I now hope to be indulged with your attention; and I should but ill acquit myself to that indulgence, in wasting it upon doctrines long since worn out of use,

B 2

use, or trifling with it in barren subtleties, or in a detail of common-place matters, familiar to all who have passed the threshold of the profession.

I mean to direct and confine my present Reading to certain points of legal learning, which, though they are occasionally very useful and important to be known, are however not of such frequent occurrence as to meet the attention of every Gentleman in the course of practice; nor yet are the subjects of such notice in our books, as to furnish him with that information which particular occasions may make him wish for.

With this view I have selected and arranged a few observations upon the Statute of the 27th *Henry VIII.* of Inrollments of Bargains and Sales, in which I shall take occasion to submit to your judgments certain distinctions, for the ascertaining with a degree of scientific precision, the several species of hereditaments which are the objects of that Statute, in respect to the Inrollment of conveyances thereof by bargain and sale.

I suppose, Gentlemen, you are surprised at hearing a proposal of this nature introduced by an avowed intention in its author to avoid matters of trite knowledge, because I am confident there are many to whom the Statute I have mentioned seems to stand in need of no sort of comment

ment or explanation, but to be sufficiently explicit in regard to its intended objects, and clearly and expressly to ascertain what are the conveyances to the operation of which the Legislature intended to make the ceremony of inrollment necessary.

A mere perusal of the Statute, I confess, affords ground for such a belief; but I apprehend a little closer attention to it will satisfy us, that the distinctions I have proposed for the subject of your present notice, are not so obvious as the first glance represents them.

The Statute makes certain ceremonies requisite to the operation of a bargain and sale of manors, lands, tenements, or other hereditaments. Now, to attain a clear notion of the application and extent of this Act, it is necessary to settle what is meant by a bargain and sale, what are the particular cases in which any sort of hereditaments can be said to pass by bargain and sale only; which latter point involves another inquiry, whether this predicament is applicable indiscriminately to all sorts of hereditaments; and if not, to what sorts its application is properly confined.

Many cases might be put in which a practitioner, for want of this sort of preliminary knowledge, would find it difficult to ascertain,

upon any solid grounds, whether a proposed conveyance falls under the description intended by the Statute or not.

To what else than an inattention to this ground-work can I ascribe an opinion, which I have known prevail with some Gentlemen of the profession, for which indeed they do not want the sanction of printed precedents in conveyancing, that a grant, for valuable consideration in money, of an estate of freehold or inheritance in a subsisting rent, may be made to pass the legal estate by a naked deed, not grounded on any preceding act or deed, to vest the possession, and give it the operation of a release; nor perfected by inrollment, or any other ceremony than the mere execution of the deed itself; for which they assign as a reason, that rents are of that species of hereditaments which lie in grant; though, at the very same time, they would start at the proposition of extending the like doctrine to the conveyance of a reversion or remainder in lands, notwithstanding such a reversion or remainder is an hereditament, which equally lies in grant as a rent does.

There are others again who, for want of considering the principles on which these points turn, seem to think that every species of hereditament falls equally within the scope of the Statute, as comprehended in the word *hereditaments* therein used;

used; and they consequently look upon inrollment as no less requisite to conveyances by way of grant, and bargain and sale of advowsons, and commons in gross, rights of way, and other local privileges, and even personal annuities of inheritance, than to similar conveyances of lands, remainders, reversions, feignories, rents, and other hereditaments of that nature.

What real foundation there is for doctrines of this tendency, I shall leave to the result of my intended observations on the Statute referred to, and shall only beg leave to mention in this place, that the instances I have met with, of such doctrines being adopted in practice by some, and by others (more prudently indeed) regarded with all the diffidence and caution due to disputable or controverted points, have impressed me with an opinion, that an attempt to offer to your consideration, in a regular and concise manner, the result of some general observations which have from time to time occurred to me upon the subject, in cases where my attention has been professionally called to it, will be no improper discharge of my duty on the present occasion.

In order to trace the distinctions I now mean to offer upon the subject of inrollments from their very first principles, it will be necessary for me to consider the definition and divisions of

hereditaments; preparatory to which I must notice the general distribution adopted in our laws, of the subjects of property into things *real*, and things *personal*.—The former consists of *lands*, taken in the full legal extent of that word, according to which it comprehends every species of land, soil, and water, with the unsevered produce and contents of them, and all buildings, and other things of a substantial, fixed, permanent nature, in, upon, under, or locally connected with or annexed to the soil.—The latter, that is things *personal*, consists of things of a contrary description, which, instead of being fixed, permanent, or local, are entirely detached from land, transient, moveable, and capable of being transported from place to place.

Now the word *hereditaments*, in our law, is applicable to both these species of things, but in a different mode or degree of relation; for when applied to the first, *viz.* things *real*, it generally denotes the things themselves which are the subjects of property, without regard to the nature or extent of property therein. Thus things *real*, that is, lands, in all the extent of the above definition of them, are distinguished by the denomination of *hereditaments real*; but the word *hereditaments*, when used in relation to personal things, does not import or signify the things themselves, but is only applicable to them in respect of some inheritable right of which they are

are in some mode or other the subject; and, in this sense, inheritable rights relative to personal things only, and distinct from any local connection, are called *hereditaments personal*.

Of a nature in some measure intermediate between the two already noticed, there is a third application of the word *hereditaments*, wherein it is used to denote inheritable rights respecting lands, or something issuing therefrom, or exercisable therein, or having at least some local connection or relation separate and distinct from the enjoyment of the lands themselves. Inheritable rights of this description are termed *hereditaments mixed*, from their local relation on the one hand, and the personal perception, enjoyment, or exercise of them on the other. Hence we obtain the division of hereditaments into *real, mixed, and personal*.

But I apprehend it may be asked, under which of these three classes, remainders and reversions in lands are to be ranked? seeing they neither denote the things themselves which are the subjects of the property so denominated, nor are descriptive of rights relative to personal things, nor rights respecting lands, or things issuing out of or exercisable in the same, distinct from the enjoyment of the lands themselves; but import rights to the future enjoyment of the very lands themselves. I think there can be no reason to
hesitate

hesitate in considering them as comprehended under the denomination of *real* hereditaments; because things real, as above defined, are the immediate and only subject of them.

- This construction, it is manifest, will extend the application of the word *hereditaments*, in respect to things *real*, a degree further than what I have before noticed; so as to make hereditaments real comprehend as well the things themselves, as inheritable rights therein; and this is the extent in which I mean to use the expression *real hereditaments* through the sequel of my present discourse.

Besides the distribution of hereditaments into real, mixed, and personal, there is another general division of them into *corporeal* and *incorporeal*, material to be attended to in this place.

Corporeal hereditaments are such as are of a substantial corporeal nature. This description, therefore, is confined to those subjects of property which are comprised under the denomination of things *real*, as before defined.

Incorporeal hereditaments are such as derive the denomination of hereditaments, not from the things themselves which are the subjects of the enjoyment, but from the inheritable rights of which they are the subject; for rights are of an
incorporeal

incorporeal nature, and exist merely in the power and exercise of enjoyment.

Incorporeal hereditaments therefore comprise the two divisions of mixed and personal hereditaments already noticed; and, under the same description, I would in this place be also understood further to include such real hereditaments as consist of rights to the future enjoyment of lands divided from the immediate present possession: for though I do not recollect that remainders or reversions are anywhere expressly ranked under the division of incorporeal hereditaments, yet, unless we deny them to be hereditaments, our division must be defective if they are not comprised under the one or other branch of it, and to that of corporeal hereditaments I think they are not properly referable; for though corporeal hereditaments are their subject, yet, whilst the rights remain distinct and divided from the right of actual possession, I see nothing substantial in their nature, nor do I comprehend how they can be considered as invested with any degree of corporeality. On the contrary, they seem clearly to fall within that predicament which I take to be the criterion of an incorporeal inheritance, *tangi non potest, nec videri*.

There are also other properties common to them with other estates, which are universally and expressly arranged in the class of incorporeal inheritances;

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inheritances, for instance, they do not lie in livery, and when once created, and subsisting as such, cannot be transferred without deed ^{not by} ~~but by~~ ^{and} ~~they~~ ^{before the Stat^t of Mortmain or of frauds.}

For these reasons, and to avoid a greater number of divisions than is conducive to the purpose I have in view, I shall class remainders and reversions in the rank of incorporeal hereditaments.

Thus far we have traced the general distribution of hereditaments into real, mixed, and personal, and into corporeal and incorporeal: But, to clear the way for the distinctions I am aiming at, we must still proceed a step further, and notice another division of incorporeal hereditaments into two classes.

The first, comprising such real hereditaments as consist of rights to future enjoyment of lands divided from the right of present possession, as remainders and reversions, together with such mixed hereditaments as consist in (things issuing out of lands) or to be (rendered, paid, or done by the tenants or owners of lands in respect of the tenure thereof.)

The other class, extending to all the residue of incorporeal hereditaments; namely, to those mixed hereditaments which, though they relate to lands, or some benefit thereout, or have a local

local relation, yet are distinct from the ownership or right of enjoyment of the lands themselves, or of any thing to be paid, rendered, or done by the tenants or owners of land in respect of the tenure thereof, as well as to the whole class of personal hereditaments.

Now, at common law, corporeal hereditaments were said to *lie in livery*; that is, they were passed or transferred from one person to another by a delivery of the possession; the ceremony of which delivery, in order to pass an estate of freehold or inheritance therein, was termed *livery of seisin*; and an estate of freehold or inheritance in such hereditaments would not pass without this ceremony of livery, except by matter of record, or where the conveyance was from the person entitled to the remainder or reversion to the tenant in possession, or vice versa, or from one joint tenant to another, or in cases of a partition or exchange, and in some other special instances.

But incorporeal inheritances are from their nature incapable of any actual delivery or tradition from one person to another; they therefore required a deed to grant or pass them; and no estate therein could pass without deed, unless in some special instances similar to some of those I have noticed in respect to passing corporeal inheritances without livery of seisin.

All incorporeal hereditaments were therefore said to lie in grant, because they were the subjects of a grant by deed, and not of any transfer by delivery of the possession; but, amongst incorporeal hereditaments, this distinction is to be attended to, which was the motive for the division I have made of such hereditaments into two classes; that though the whole denomination of incorporeal hereditaments require a deed to pass them, and therefore all are so far equally said to lie in grant, yet those comprised in the first branch of the division I have made of them, required also the privity and assent of the tenant of the land by whom the rent was payable, or services due, to give effect to the grant by which the remainder, reversion, rents, or services were intended to pass. The act by which such tenant signified or expressed this assent was called *attornment*, a ceremony as much requisite to the operation of a grant of the hereditaments last mentioned, as livery of seisin was to a conveyance of an estate of freehold and inheritance in corporeal hereditaments.

But those incorporeal hereditaments which fall under the latter branch of any division of them passed completely by the mere deed of grant thereof, without the aid of any other ceremony than the mere execution of it, to perfect its operation; for as such hereditaments have not, on the one hand, any corporeal nature to require

or be capable of any actual delivery or tradition from one to another, so neither have they, on the other, any such connection with or relation to any act of the tenant of the land in respect to his rendering, paying, or performing any thing, as to render his privity or consent at all requisite or material to any alienation or disposition of them.

But though conveyances of corporeal, and also of such incorporeal hereditaments, as fall under the first branch of my division of them, originally required the respective ceremonies of livery of seisin and attornment to perfect them in the instances I have mentioned, yet, after the introduction of uses had given birth to a beneficial interest in hereditaments of both those kinds, distinct from that legal estate therein which alone was known to and acknowledged by our old common law, we find a very material alteration in respect to the modes or means requisite to pass or transfer an interest in such hereditaments.

Uses were equitable rights in one person to receive and enjoy the profits of, and direct the disposition of the lands themselves, whilst the legal estate or seisin in law was vested in another person.

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These uses were the subjects of the jurisdiction exercised by the Court of Chancery, and were, in effect, what mere equitable estates or trusts as distinguished from statuteable uses now are.

Now when, through the medium of these sorts of interests styled *uses*, the jurisprudence of equity was let in upon the dispositions of real property, the Court of Chancery, regarding the nature upon which contracts for the alienation of property are grounded, gave an equitable effect to two species of grants, (or contracts considered as equivalent thereto,) which, without the requisite ceremonies of livery of seisin or attornment, had no operation at all in law. The considerations I am now alluding to are those which are commonly distinguished by the respective epithets of *good* and of *valuable*, the former being the consideration of blood or of marriage, the latter of a pecuniary price. Both these considerations, from their interesting and obligatory natures, were considered by the Court of Chancery as raising a use in the subject of the contract or intended grant, for the benefit of the person in or from whom such considerations existed or moved; and though the legal estate in the subjects of such contract or intended grant was not thereby altered or transferred for want of the ceremonies before mentioned, yet the grantor

grantor or contractor was, upon the ground of such considerations, considered in equity as standing seized or legally entitled to the things which were the subjects of such contract, in trust for the covenantee or intended grantee.

Contracts of the former of these two kinds, that is, where blood or marriage is the consideration, were denominated, *covenants to stand seized to uses*; because they amounted either to an express covenant, or an implied engagement to stand seized for the benefit, that is, to the use of the grantee or covenantee. Those of the latter kind, namely, where pecuniary consideration was the motive, were called *bargains and sales*. Here I shall drop the former kind, and confine my discourse to what concerns the latter, so far as it falls within the intended limits of my present Reading. I am now therefore come to the definition of a Bargain and Sale, as applied to lands and hereditaments before the Statute of Inrollments; for that statute introduced some alterations and qualifications in the nature of the definition.

A bargain and sale of hereditaments, before that Statute, may be defined to be an express or implied grant or contract for the assurance of them in consideration of money, in which the Court of Chancery supplied its insufficiency to pass the estate in law, by the construction of its

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raising a use for the bargainee or intended grantee. The words *bargain* and *sell* were by no means essential or requisite to the operation of such contract or intended grant: Any other words expressing the intention that the person from whom such consideration moved should have the lands, or other subject of the intended grant or contract, were sufficient to raise the use, as a covenant from the intended grantor, in consideration of money, to stand seized to the intended grantee; or an intended alienation by the words *grant* and *devise*, or *grant* and *alien*, have been held effectual for the end, where the consideration was a pecuniary one; for the consideration itself, in these cases, is the sole ground of raising the use, according to the intent of the contract, however expressed; and it was that which constituted and gave the characteristic essence of a bargain and sale to the transaction.

Now, therefore, I think it follows, that as a grant by deed alone, unless it was for a valuable consideration, had no effect at all to pass any estate, interest, or use, legal or equitable, in hereditaments corporeal, or in those which are comprised in the first class of my division of incorporeal hereditaments, without the subsequent ceremonies of livery of seisin or attornment, grants thereof by deed alone for valuable consideration, passing a use in equity, must be said to derive their whole effect from the quality

of a bargain and sale; and therefore the interest which passed thereby was properly said to pass by reason only of a bargain and sale thereof; for nothing could pass by the deed, independent of that consideration which constituted it a bargain and sale. On the other hand, a grant by deed alone of any of the hereditaments comprised in the last class of my division of incorporeal hereditaments, being all that was requisite to convey the legal estate in them, such a grant, whatever might be its consideration, stood in no need of any equitable construction to give it effect.

Uses were raised by the construction of equity, in the instances I have just now mentioned, to supply the defect of the legal estate. There could be no call for the aid of such a construction where no such defect subsisted. A use could not be created as a thing distinct from the legal estate, for the benefit of a person to whom the legal estate itself passed. Where a grant carried every possible interest in the subject of it, there was nothing left to require or admit of the aid of a constructive conveyance in equity; and as those hereditaments, which are comprised in the last branch of my division of incorporeal hereditaments, passed by deed only, without requiring or being susceptible of any other act or ceremony to perfect the operation of the grant thereby made, without the least regard to the considera-

tion of the grant, such hereditaments did not, even where the grant was in consideration of money, pass by force of any equitable quality which the deed itself derived from such consideration; nor consequently could they, in such cases, be said to pass by reason only of the bargain and sale, as they would equally have passed by the deed alone, had that consideration which constitutes the essence of a bargain and sale been wanting.

The inference I mean to draw from the above premises is, that before the Statute of Uses, corporeal hereditaments, and those incorporeal hereditaments comprised in the first branch of my division of them, in all cases of grants thereof by deed alone in consideration of money, passed, so far as they passed at all, that is, in equity, by reason only of the bargain and sale thereof; but this predicament of passing by reason only of a bargain and sale thereof was not applicable to the incorporeal hereditaments comprised in the last branch of my division of them, even in cases of a grant by deed only for pecuniary consideration; for the effect of the grant was complete by the deed, independently of any consideration, and incapable of being perfected by any other ceremony whatever.

The Statute 27th *Henry VIII.* of Uses next occurs to my consideration; which Statute made a very

a very material alteration in the effect as well of bargains and sales, as of all other contracts or conveyances, the operation of which depended on the doctrine of uses. That Statute, by enacting that "where any person or persons stand or be seized, or at any time hereafter shall happen to be seized of and in any honours, castles, manors, lands, tenements, rents, services, reversion, remainders, or other hereditaments, to the use, confidence, or trust of any person or persons, or of any body politic, by reason of any bargain, sale, feoffment, fine, recovery, covenant, contract, agreement, will, or otherwise, by any manner or means whatever it be, that in every such case, all and every such person and persons, and bodies politic that have, or hereafter shall have, any such use, confidence, or trust in fee simple or fee tail, term of life, or for years, or otherwise, or any use, trust, or confidence in remainder or reversion, shall from henceforth stand and be seized, deemed, and adjudged in lawful seisin, estate, and possession of and in the same honours, castles, &c. to all intents, constructions, and purposes in the law, of and in such like estates as they had or shall have in use, trust, or confidence of or in the same;" transferred the legal estate and possession to the use, and thereby vested the legal estate or seisin in the person who before had or took only the use, in the same plight and manner as

the use was before vested in him; the consequence of which was, in regard to bargains and sales, that wherever the use passed, before that Statute, by reason only of a bargain and sale, the legal estate becoming executed to the use by the Statute, passed to the bargainee by reason only of such bargain and sale, without the ceremonies of livery of seisin or attornment; where, before that Statute, they were requisite to the transfer of the legal estate. But this Statute left the operation of grants of those incorporeal hereditaments that are comprised in the last branch of my division of them, which depended on the deed alone, as full and as independent of the nature of the consideration as it was before; nor was there any room for its operation in uniting the legal estate to the use where they were never severed, nor consequently any opening made for their reunion, as in the cases of grants by deed only of the incorporeal hereditaments comprised in the last branch of my division of them, where no use passed distinct from the legal estate before the Statute; but the legal estate itself passed, and consequently did not remain to be executed by the Statute to that use which originally passed inclusively with it; so that after the Statute of Uses, all grants by deed only, for valuable consideration in money, of any estate of freehold or inheritance in corporeal hereditaments, as well as in such other hereditaments as are comprised in the first branch of my division of incorporeal hereditaments,

hereditaments, still continued to owe their operation and validity to the nature of the consideration; and such hereditaments, therefore, in those instances, were properly said to pass by reason only of the bargain and sale; but all grants of the incorporeal hereditaments, comprised in the last branch of my division of them, still remained; in this respect; upon the same footing as they were before the Statute; and as a grant by deed only was all that was requisite to pass them, independent of its consideration, the effect of such deed could not in any case be ascribed to the nature of its consideration, nor consequently the hereditaments thereby granted be said to pass by reason only of a bargain and sale.

I am now come to the construction of the Statute of Inrollments, 27th *Henry VIII. c. 16.* in regard to the distinctions I have in view, between the hereditaments which are, and those which appear to me not to be the objects of it; a consideration which, after the several steps I have been taking to prepare the way for it, will take but very little of your time, as it will require scarcely any thing more than an attentive perusal of the Statute itself, with an obvious reference to the principles and distinctions already treated of, to determine the construction of it.

By the Statute I am now speaking of, it is enacted, "That no manors, lands, tenements, "or other hereditaments, shall pass, alter, or "change from one to another, whereby any "estate of freehold or inheritance shall be made "or take effect in any person or persons, or any "uses thereof to be made by reason only of any "bargain and sale thereof, except the said bargain and sale be made by writing indented, "sealed, and inrolled in one of the King's "Courts of Record at *Westminster*, &c. ; and the "same inrollment to be had and made within "six months next after the date of the said "writings indented," &c.

Now, a cursory review of the operation of the preceding Statute of Uses, with a slight degree of attention to the great inconveniencies introduced by that Statute, in laying open the disposition and alienation of lands, and estates issuing thereout, to the operation of secret, hasty, improvident conveyances, for the consideration of ever so trifling a sum of money, to bring them within the description of bargains and sales, so as to raise a use to be executed by that Statute, could not fail to impress one with the idea, that the Statute of Inrollments immediately following it, was intended as a remedy to the inconveniencies so introduced by the preceding Statute ; and, in this view, one should be

be naturally led to consider the latter Statute as directed to those things which were the subjects of the inconveniencies occasioned by the former.

Now, the mischief to be remedied consisted in the power introduced of transferring the legal estate of freehold and inheritance in hereditaments by mere deed, without the solemnities of livery of seisin or attornment, which were before requisite to the operation of such conveyances. It consequently extended only to the conveyances of those hereditaments which, by the common law, required the aid of such ceremonies, and could not pass by mere deed without them. The Statute of Inrollments may be considered as introducing the ceremonies expressed therein, in lieu of the solemnities of livery of seisin or attornment, which had been dismissed by the preceding Statute of Uses, and consequently as not intended to apply to any other cases than those wherein the Statute of Uses had had such an effect; and the inference would be, that the general word "*hereditaments*," used in the Statute of Inrollments, should be understood accordingly, and not taken to extend to grants by deed of such hereditaments as never required any of those solemnities to perfect them, which the ceremonies instituted by the Statute of Inrollments were intended to supply the place of. But, however, the penning of that Statute, when referred

referred to the principles I have noticed in the preceding part of this discourse, seems to prevent all occasion for resorting to any thing else to explain the intention of the Legislature in this respect; for though the Statute says "lands, tenements, or other hereditaments;" yet the context confines its operation to those cases wherein the hereditaments, of which it speaks, can be said to pass by reason only of a bargain and sale thereof; for it is upon the passing of any estate, interest, or use, of freehold or inheritance, by reason only of a bargain and sale, that the Statute puts a negative. Now, when the Statute denies effect to a conveyance by reason only of a bargain and sale, it implies a supposed existence of other ceremonies which might be used to give it effect; and therefore it has been held, that a deed purporting to be a bargain and sale of a reversion, though it was not inrolled, passed such reversion by the aid of a subsequent attornment, where there were words in the deed sufficient for a grant at common law. So likewise a deed of bargain and sale not inrolled has been made good as a feoffment by the subsequent ceremony of livery of seisin.

Now the incorporeal hereditaments included in the latter branch of my division of them, did not, at the time of passing the Statute of Inrollments, admit of any other ceremony than a deed
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of grant to perfect the conveyance of them; and therefore a grant of them could not properly be considered as falling within a description which implied the existence of other auxiliary acts or solemnities beyond the execution of the deed itself. Besides, we have already seen, that the predicament of passing by reason only of a bargain and sale, though applicable to a grant for valuable consideration by a deed only, of hereditaments corporeal, and of those incorporeal ones which are included in the first division of them, was by no means applicable to a similar conveyance of those incorporeal hereditaments comprised in the latter branch of my division of them, of which no use at all is raised by virtue of the consideration in such cases, because the legal estate in such hereditaments passes directly and originally by force of the primary inherent nature of the deed itself, independent of the consideration which gives it the adventitious secondary quality of a bargain and sale.

But to put this matter to a short issue, I would ask, in the case of a grant by deed, for valuable consideration, of an advowson or common in gross, or of any other of the incorporeal hereditaments comprised in the last branch of my division of them, whether such hereditaments, passing by such a deed, could be said to pass by reason only of a bargain and sale? And to prevent

vent any hesitation in answer to this question, I would further ask, whether the same hereditaments would not have passed by the same deed, without the pecuniary consideration which superinduces, to the essential quality of the deed itself, the accidental one of a bargain and sale? If it would, it clearly follows, that the hereditaments so passing cannot be said to pass by reason only of that quality in the deed without which it would pass equally well.

The inferences I mean to draw from the preceding reasonings are, that any conveyances for money by deed only, of any estate of freehold or inheritance, in any corporeal hereditaments, or in any of those incorporeal hereditaments which fall under the first branch of my division of them, are clearly within the Statute of Inrollments, and therefore require to be made in the manner, and to be perfected by the ceremonies instituted by that Statute*.

But,

* The Author, in his practice, adhered to the principle here laid down. The following observations were subjoined by him, at a very late period, to a draft of a deed of grant for conveying a reversion in fee.

“ I have perused the above draft, to which I have added
 “ a reference to a lease for a year, as that will be requisite
 “ if this be not inrolled. A reversion or remainder in fee
 “ is an hereditament within the Statute 27th *Henry VIII.*

“ c. 16.

But, on the contrary, that grants by deed, whatever be the consideration of them, of any of the incorporeal hereditaments comprised in the latter branch of my division of them, are not within the said Statute, but will take effect by the execution of the deed itself, in the same manner as before that Statute.

I shall refer, for the doctrine offered in the first of the above inferences, to the case of *Lade v. Baker*, reported 2 *Ventris* 145. 266., where a grant and assignment of a subsisting rent-charge by deed from the grantor to his son, as well for a pecuniary consideration, as that of natural love and affection; the Court found themselves under a necessity of giving it effect by way of covenant to stand seized to uses, on account of its being pleaded without attornment or inrollment.

And, in support of the latter inference, I shall refer to the case of a bargain and sale of a manor, to which an advowson was appendant, by inden-

"c. 16. of Inrollments: A grant of money is in effect a bargain and sale, and therefore will not operate without inrollment (at least without attornment, and that would be precarious since the Statute of *Ann*); therefore conveyances of any freehold estate in remainder or reversion require the same forms of inrolling, or of lease and re-lease, as those of estates in possession."

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ture not inrolled. It was held the advowson did not pass, because not intended to pass as severed, but appendant; and as appendant it could not pass, because the manor did not, for want of Inrollment; *Jenkins* 265. pl. 68. Now, the appendancy of the advowson, in this case, being the only objection to its passing, it follows, that Inrollment was not necessary to pass it, had it been in gross.

It now only remains for me to take notice of the Statute 4th Ann, c. 16. s. 9., by which it is enacted, " That all grants and conveyances
 " thereafter to be made, by fine or otherwise,
 " of any manors or rents, or of the reversion
 " or remainder of any messuages or lands, should
 " be good and effectual, without any attornment
 " of the tenants, &c. as if their attornment had
 " been had and made."

This section of this Statute, at first view, seems to clash with the Statute of Inrollments; and, if it were to be understood in all the general extent of the words, would, in effect, amount to a virtual repeal of the Statute of Inrollments, so far as it related to hereditaments, which, at common law, required attornment to pass them; for, as I have already observed, such hereditaments, to the bargain and sale whereof Inrollment was made requisite by the Statute, would
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pass by deed of grant unenrolled, by the aid of a subsequent attornment.

Now, therefore, if the Statute of *Ann* is extended to these cases, it will follow, that a grant by deed for pecuniary consideration, which, after the Statute of Enrollments, would have been effectual with attornment, though unenrolled, would now, since the Statute of *Ann*, be of the same validity without attornment; and consequently a grant by deed alone would be sufficient without either enrollment or attornment. But the general words in the Statute of *Ann*, I conceive, are, by no means to be allowed so extensive an effect; for, first, a Statute made for removing the necessity of certain ceremonies, must naturally be understood as intended only for such cases where those ceremonies were before necessary, and could not be dispensed with. Now, attornment was only necessary in grants operating at common law, and not in those conveyances which had their effect by way of use; consequently the latter, amongst which are included all those which were the objects of the Statute of Enrollments, cannot properly be considered as the intended objects of the Statute of *Ann*: And should it be said, that grants, since the Statute of Enrollments, perfected by attornment, without any enrollment, do not fall under the description of conveyances operating by way of use, that effect being denied them by the last mentioned

mentioned Statute, the direct and short answer would be, that whatever might be the nature of those grants, it certainly would be contradictory to all the rules which hold in the construction of Statutes, to extend such general indefinite words, as the words "*or otherwise*," in the Statute of *Ann*, to the repeal of a preceding Statute unnoticed in the subsequent one; and in a case where there are sufficient subjects for the application and operation of such general words in the subsequent act, without considering them as interfering in any degree with the act preceding; for it is a rule, that where two Statutes seem to cross one another, and no clause of *non obstante* is contained in the second Statute, so that the one may stand with the other, both ought to stand in force. *Roll's Rep.* 154, *Ward v. Smith.* *Dyer* 347, b, *Weston's Case.* And general words in Acts of Parliament are, in a variety of instances, restrained, to avoid an apparent inconvenience or inconsistency with subsisting laws, the repeal of which was not apparently within the intention of the Statute wherein such general words are contained; for repeals by implication are things discountenanced by law; never allowed of but where the inconsistency or repugnancy is plain and unavoidable; for such repeals carry along with them a tacit reflection upon the legislators, that they should inadvertently and ignorantly make one act repugnant to and inconsistent with another; and therefore such

repeals have ever been interpreted so as to repeal as little of the precedent law as is possible; 10 *Mod.* 118. And though the general rule is, that *leges posteriores abrogant priores*, yet this holds only where the last act is irreconcilably contradictory to the preceding, and never takes place where there is any possible construction whereby they both may be made to stand together. Upon these grounds, the Statute of Inrollments appears to stand entirely unaffected by the subsequent one of *Ann* respecting attornments.

I have now, Gentlemen, concluded my proposed observations, in which I have purposely passed by a variety of matter which presented itself to my attention, and of which I might have availed myself, without any impropriety, upon this occasion; but as it did not lay across the direct path which I chalked out to myself for the discharge of the duty upon which you have been pleased to call me here, and as it appeared to me, that the shortest line in which I could possibly arrive at the end I proposed would put your patience sufficiently to the trial, I have carefully avoided any unnecessary digression whatever.

The doctrine of bargains and sales, if considered in its full extent, is very comprehensive

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and important. I have just touched upon one of its outlines, leaving the design at large, with all its proper lights and shades, to be completed by those whose superior judgment and abilities put them more upon the level of such a task.



ARGUMENTS

IN THE

CASE *of the* REPRESENTATIVES *of General*
STANWIX *and his* DAUGHTER.

[illegible]

3. 2. 2.

Journal of Management Studies, 19(6), 709-728.

1. *Chlorophyll a* and *Chlorophyll b* were determined by the method of Arar and Collins (1971) using a Shimadzu 1010 UV-Visible Spectrophotometer.

A R G U M E N T S

IN THE

CASE *of the* REPRESENTATIVES *of General*
 STANWIX *and his* DAUGHTER.

THESE ARGUMENTS were composed on occasion of a very singular cause brought before the Court of Chancery in the year 1772, where it had met with a no less singular discussion. It was the Author's intention (as the Editor has frequently heard him say,) to try what could be advanced, with some appearance of reason, in a case that seemed to mock every principle of judicial decision.

ARGUMENTS in Favour of the REPRESENTATIVE of the DAUGHTER.

MR LORD,

THE case which now calls for the attention of this Court is simply this: A father and his daughter set sail in the same vessel from *Ireland*; the vessel, it seems, was cast away in its passage to *England*, and not a single person on board saved. Now it so happens, that the Representative of the father to his personal estate is not the same person who would have been entitled to it as Representative to the daughter, in case she had survived her father*. The first person is nephew

* On behalf of the party whom the General's survivorship would have benefited, it was argued, that the ship being lost in tempestuous weather, it was more than probable that the General was upon deck, and that the daughter was down in the cabin (as is almost ever the case with ladies in these situations), and of course subject to more early loss of her life than the General, who, as a man of arms and courage, was, it was asserted, more able and more likely to struggle with death than a woman, and

nephew to the father; the other is the daughter's maternal uncle.

The question therefore arises, what shall we presume in the present case to determine which of the two died first; and consequently, to decide which of the two claimants is entitled, according to our laws of succession, to the estate in dispute? It appears from the state of this case, that the present question is really this: Of three different incompatible presumptions, which are we to choose? The presumptions are as follow, *viz.* That the father survived the daughter; that the

and in which he might probably have been assisted by the broken masts, and other parts of the rigging.

On the other side, it was contended, that the General was old, and consequently feeble, and by no means strong enough to resist the shocks of such a terrible attack: that the daughter was of a hale constitution, and though of the weaker sex, yet being younger than her father, was proportionably stronger, and, from the circumstance of youth, more unwilling to part with life: that the probability of survivorship was therefore infinitely in favour of the daughter.

A second wife of General *Stanwix* also perished with him, and her representative brought forward a separate claim to the disputed property; but as this is not noticed by the Author, it may be sufficient to add, that the Court, finding the arguments on all sides equally solid and ingenious, waived giving any decision, and advised a compromise, to which the several claimants agreed.

daughter survived the father ; or, that they both died in the same instant. It has indeed, with some colour of reason, been objected, that, of these three positions, two only can be deemed presumptive, *viz.* That the father survived his daughter, and that the daughter survived her father ; and that the third, *viz.* That they both died in the same instant, is neutral, and a sort of mean betwixt the other two ; for the two first, as it is said, being diametrically contrary to each other, and no grounds of greater probability appearing in support of the one than of the other, it follows, that they must necessarily destroy each other, and leave the third as the unavoidable result of their mutual destruction. Consequently that position is so far from bearing a presumptive form itself, that it is the very state of things we are compelled to admit by wholly avoiding presumption.

The argument, I confess, is plausible, and as such it requires that I should speak to it. In the first place, What do we mean by a presumption ? Is it not the admitting and supposing facts to have existed without evidence that they did so ? Do not the three positions above stated assert three distinct facts, neither of which is supported by any kind of evidence whatsoever ? How is it possible then to suppose any one of them true, and not call it a presumption, *i. e.* the supposition of a fact without evidence ? The very arguments

ments made use of to prove the non-presumptive nature of the one, because it necessarily exists when the other two are supposed by their mutual opposition to destroy each other, will go much too far, by proving at the very same time the impossibility of finding even one presumption among the three; for, upon examination, it will appear that no two of them can stand together: Therefore, take which two we will, and because they are incompatible, suppose they destroy each other, the third of course exists as the result of their mutual destruction.

Having thus, as I hope, shewn, that all the three are in their own natures equally presumptions, and consequently, that our question is nothing else than which of three presumptions demands the preference, it now remains to consider the presumptions themselves, their different natures, and their respective degrees of claim to our attention and assent.

The two first, it must be acknowledged, are of a nature quite indifferent. No reason appears to overthrow either of them, nor can any thing be objected to either, but the apparently equal probability of the other. But as to the third, *viz.* That they died both in the same instant, it presents quite a different face; a position bursting, as it were, with the bigness of its own inconsistency;

consistency ; a fact whose existence must seem to have been the concerted effect of so singular and unaccountable a coincidence of circumstances, and combination of incidents, that whoever presumes it in that instance, does little less than confess to the world his belief of a miracle. Can we admit these two people to have died in the same instant, without supposing a most extraordinary, nay even a preternatural concurrence of all that variety of circumstances which every man's imagination must suggest to him, as bearing some share in the direction of the last moments of life to persons in the unfortunate situation of those we are speaking of ? Such a concurrence, it is true, may happen to two persons out of ten thousand ; but what is the chance for it when the question is confined to a particular two only ? Can any man in his wits suppose even the most distant probability (I had almost said possibility) of it, with respect to any two particular persons breathing, much less with respect to two so totally dissimilar in almost every thing, which, in the case before us, one should think, respected the hastening or protracting their last moments, as the persons of an aged father, and a daughter in the prime of life ? Strange as it is, such nevertheless is the supposition to which we subscribe assent when we presume that one and the same instant put a period to both the lives in question ; nay, such is the position the probability

lity of which we admit, unless we absolutely presume they did not die together.

In opposition to what I have been saying, there is indeed an argument, or rather the form of an argument, of which I make no doubt the Gentlemen of the other side will endeavour to avail themselves. It must be owned it is rather of too abstract a nature to merit attention in a question of this sort; but, however, lest its subtilty should elude our apprehension, and its ingenuity, standing in the place of real weight, deceive us into a notion of its being unanswerable, and so incline us to approve it in contradiction to our senses, I think it incumbent upon me, in this place, to bestow that attention upon it which may be requisite, in order to enable us to distinguish its real from its imaginary force.

The argument is this :—Time, say they, is no otherwise divisible than by a succession of events or facts: We have no other means of distinguishing one moment or particle of duration from another, than by the distinct facts they afford us; these are the marks which, to our capacities, divide them from each other; consequently any period of time wherein such marks of its separate parts do not unto our knowledge exist, must unto us be as one point or indivisible moment; for as we have not the data necessary for our abilities to distinguish its parts, there remains nothing to distinguish

distinguish such a period from any other instant which we cannot divide; consequently we are compelled, as far as respects ourselves, to consider such a period as an indivisible instant of time.

Hence, say they, all that we know concerning General *Stanwix* and his daughter is, that they set sail; and that they were drowned; and the intervening period affording us no facts to divide one moment thereof from another, ought and must necessarily be considered as one indivisible point of time, and the very ground of controversy who died first must fall of course.

The ingenuity of the argument I admit; the justness of its application I deny. I shall not here dispute their principles, whatever room I think there might be for it, were that necessary to my purpose; neither shall I consider the difference betwixt ideas and events, or that which unto us creates, and that which measures succession. No; to avoid useless disputes, I take the very principles themselves have assumed, and try if it be not possible to make a more reasonable, serious, and effectual use of them than what, I must confess, they seem to me to have done.

Time (say they) is only divisible by facts: Very well; it is divisible by facts then. It is admitted

admitted the General and his daughter set sail; it is admitted they were drowned. These two positions are acknowledged (by both the present claimants) as two distinct, indisputable, known facts; the one being the commencement, the other the determination of—What? Of an indivisible moment of time, say the Gentlemen who oppose us. A modest stroke truly, and nicely calculated. Half one Hocus Pocus more might have annihilated the commencement and determination, as well as the period itself. Indeed, when the Gentlemen were at it, I am surprised they did not remove the grounds of our contention at once, and dispatch both General and daughter, by some more instantaneous means than drowning is generally understood to be.

But, to be serious, is it possible these two facts should immediately succeed one the other, or is it not a point of reasonable condescension at least, that when a man assumes a fact as known, he should also allow the existence of such facts, without which the assumed fact could not have existed? When we know of their being drowned after setting sail, do not we likewise know the existence of facts, which must necessarily have existed previous to their being drowned? Must not the violence of the waves upon the vessel have existed previous to its destruction or sinking? Must not the exposure of the parties themselves to the waves have succeeded the commencement

commencement of such destruction or sinking of the vessel in which they were? Must not an interval have intervened betwixt their being so exposed, and the final existence of their lives?

extension Is it possible they should have been drowned, without at least this succession of facts previous thereto? Or are we to conclude, in despite of reason and possibility itself, that such facts did not exist, because we cannot produce an eye-witness of them?

Common sense, indeed, might give these, and such like questions, a plain and reasonable answer, and soon tell us what becomes of an argument, founded on the non-existence of facts, during a certain period, which period we terminate by an event, which supposes certain known facts previously necessary to its own existence, to have intervened since the commencement of the said period.

Such answers, however, we leave to common apprehensions; and as to the Gentlemen who may offer the above argument, all that we have to ask of them is, that they would desist from their claim, or cease to deny those facts, without which the very fact on which their claim is founded could not have happened. For my own part, I cannot see how they are to avoid one or other of those conclusions. The first they will reject for their own sakes; and, by choosing

choosing the last, they give what I contend for, by granting me, that the period which they have hitherto been in hopes, by their art, (an art indeed of too supernatural a description for every one to credit,) of contracting into less compass than the duration of a single lightning flash, has, to their surprise, baffled the utmost efforts of their skill, and kept itself sufficiently open to comprehend a succession of facts, which (but that such appear necessary to the existence of that whereon they found their present claim) they would hardly yet believe had time to have happened. And consequently this period, thus actually divided by known facts, can no longer, on these Gentlemen's own principles, have the least title to be considered as that punctum indivisible or magic instant, which the gravity of their romantic logic meant to silence us into a belief of.

However, they have still one method left to prove the parties must have died in one and the same instant (for want of time to do otherwise).— Let them collect their philosophy to another point, and, by dint of argument equally subtle, but more fortunately applied than the last, compel us, in spite of the dull conviction to which our understandings may stupidly adhere, to confess, that although the period in dispute cannot possibly be considered as one moment, yet it was precisely of such a duration as not to admit of a single

single instant more than what was absolutely necessary for the most immediate succession of facts which must unavoidably have preceded drowning. When this is done, I will submit; in the mean time, I shall beg leave to infer, that the period is to us divisible, and therefore may, without exceeding the comprehension of our capacities, very easily be considered as containing more than one moment for the General and his daughter to have died in.

Having thus, as I hope, duly considered the third presumption, and shewn the improbability of its nature; having fairly stated, and, I flatter myself, sufficiently obviated the most material arguments which can be framed in support of it, and given reasons, which he who controverts must combat with his senses, why that in particular can by no means claim the least share of our assent or credit, I shall now, in proper order, resume the consideration of the other two positions, *viz.* That the father survived his daughter, and that the daughter survived her father; for the glaring improbability of the third leaves the question wholly betwixt these two.

As to these it is evident, that each of them is of a nature quite possible; that neither of them required the aid of any strange conjunction of circumstances, or any whimsical conspiracy of events, to bring it about; nor any unnatural and
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annihilation of time to humour its existence. They are, in their own natures, so equal, so perfectly indifferent in regard to probability, that there is no other argument against our assent to either, than the equal probability of the other: So equal indeed are their natures, that this very truth has been wrested into an argument against our presuming any one but the third position; for (say our opponents) these two positions being equally probable, you cannot assume the one, but the same reason will force the other upon you; and it being impossible they should stand together, it follows neither can stand at all; the equality of these two is their mutual destruction, and consequently the third position must then remain clear of any other to impeach it.

These arguments might carry the appearance of some meaning, were it impossible to avail ourselves of any other means of decision, than that of the different probability of such presumptions only: But if any other rule can be found to give the least preference to one or other of those two presumptions, what then becomes of such reasoning? And let me also ask, what compels us to begin the destruction of presumption with those two in particular, either of which hath only the equal strength of the other to oppose, without any other assistance in the world; whereas that alone which is to escape in the conflict, has not only the greater strength of
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each of the other two, but also the evidence of every man's senses, and the testimony of nature itself, in strict confederacy, to assist in its overthrow? Why are we to pick those two out, and set them against each other, whilst we forcibly withhold the third; and when we suppose they have done each other's business, let loose the darling of our strange caprice as the master of a clear field, to strut in the bulk of its unrivalled improbability, and to be laughed at?

It is pretty clear the third position, when compared with either of the other two, must necessarily fall on the score of probability only; and when considered separately, it has, on the same score, nothing but an extravagant effort of credulity to keep it from sinking. Therefore, I shall by no means grant it the exclusive protection stickled for, but considering it as taking its unavoidable share in the conflict (for no two of the three can stand together,) shall conclude, that being the weakest by far of the three combatants, it certainly must fall the first.

I have entered thus far into this subject, to shew the difficulties which arise by supposing, that two equally probable contrary positions must destroy each other, without sufficiently attending to what it is we mean by destroying each other. It is true, they must destroy each other's degree of positive probability, or that which would have
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claimed our assent unto either, if the other had not been started; but still neither can incline or affect our dissent to the other, as a thing in the least improbable. All which their equality can do, is to suspend our assent, without suggesting the least hint for dissent, and to leave them both in such a state of indifference that, on the score of probability, we find no room to choose; nor, on the score of improbability, any reason to reject one more than the other, or either of them at all.

Hence appears the necessity, in a case like this before us, where decision must be had, of recurring to some other rule to direct our choice: And certainly if a rule can be found, whose most extensive construction can fix upon one of two facts, neither of which is repugnant to reason or experience, we had much better admit that rule, than, by scrupulously insisting on such a one as cannot be found, infer the compulsion of presuming what I have shewn to be so very unnatural. Nay, if we must be so scrupulous to preserve difficulties, it were better at least to toss up between two probable presumptions, than give even a glance at one so highly improbable.

The present case, however, falls within the express terms of a rule which the Civil Law offers for our application, when it says, "Where

“no evidence is to the contrary, a child shall be presumed to have outlived its parent.” Can any thing in general be more equitable, more agreeable to nature itself? And does it not, unsolicited, extend itself to our present dispute?

Here is a parent and a daughter both drowned, and no evidence that the daughter did not survive; therefore, says the rule, let it be presumed she did survive. Why is a rule so directly applicable to be rejected? It is certainly conducive to the grand end of laws in general, that some rule should be established to prevent confusion upon such cases as the present. Are we told it is no rule of the common law? If we are, I must beg leave to observe, that the present case is of the cognizance of a court, where the civil law, as far as it interferes not with the common law, is, by the sanction of the common law itself, the most general rule of decision; therefore, to have entitled this objection to an answer, we should have been told what rule of the common law this rule in the least impugns. Seeing then a rule must be had, Why will not this do? It involves in itself no absurd or improbable presumption, but only points out a decision betwixt two equal and indifferent ones, one of which we must naturally suppose to have happened. It is a rule founded on an obvious and well known principle, the common course of nature itself. True, answer our opponents,

and for that very reason it is not to be admitted here; for a rule founded on the common course of nature as its principle, can have nothing in the world to do in a case which arises from a direct interruption of nature's common course. No; that would be such a wresting of rules from their own principles, that one cannot say where it would end. What means the serious countenance of this objection? Must we then fall back again into confusion and uncertainty, because a rule which we have found expressly decisive of the present case had not this very case for its original principle? This indeed is combating for perplexity itself, and teaching us, that a distinct rule must be framed for every particular case, unless we will agree to decide it by the presumptive difference of a few minute precarious circumstances, or the less unreasonable direction of a single toss-up.

This is a doctrine which I hope will never prevail. In the present, as in all other cases, I must confess the only inquiry concerning a rule proposed seems to be, *First*, Is the rule founded on just principles? *Secondly*, Does it extend to the case in hand, by its own terms expressly, or by implication? If it be well founded, and expressly take in the case to which we apply it, what can be the occasion for further inquiry? If it does not extend expressly to the case before us, then indeed there may be sufficient reason to

recur to the extent of its principles, and examine whether the case in question arises from the same principles whereon the rule is grounded; and, consequently, whether it is by implication subject to such rule or not? But, to transpose this inquiry, and when the expression of a rule is clear, to enter on an examination whether its principles are equally extensive or no, is in fact forming a presumption against a rule; or, in other words, making a rule no rule at all; for it would be rendering the application of most rules so very difficult and controvertible, in many cases, that we might almost as well be without any rules.

But, however, to enter into this objection more closely, I must observe, that as most rules are founded on general principles only, many cases must arise among the infinite variety of events, upon principles differing from those on which rules are already founded; and yet, in many instances, these differing principles may be of such a nature, that it is an equal chance whether the rule which one principle has already supplied, is or is not the very same rule which the other principle will supply. Is it not, therefore, the most reasonable and simple way of proceeding, to make one rule serve two principles, when it is already the rule established on the one principle, and no better can be established on the other? For instance, a rule drawn from the principle of

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an interrupted nature, tells us the child outlives the parent. Now, what will a rule drawn from interrupted nature (a different principle from the other) tell us? Why, it is at least an equal chance that it should tell us the same thing, as that it should tell us the contrary, when we consider the different kinds of interruptions themselves, and the difference of vital strength and bodily abilities, upon which these interruptions are to operate. Therefore, it certainly is not sufficient ground on which to reject a proposed rule expressly comprehending the case to which we would apply it, merely because the principles whereon it is originally founded are not the very principles upon which that case itself arises, unless at the same time it is shewn, that the rule offered is not equally agreeable to the very principles of the said case, as any other rule possible to be framed can be. Certainly some regard ought to be paid to its being a rule already established, though on different principles, if it be not contrary to the principles to which we extend it; because such a regard must ever prevent a troublesome multiplicity of needless rules, and of course avoid in the end much unnecessary confusion; for one rule must at all times be more quickly known, more easily retained, and more readily applied than two can possibly be. And if one rule be equally agreeable to each of two principles whereon two different rules may be founded, as either of those different rules them-

selves can be, the one is then certainly preferable to two, because it must avoid all the dispute that will naturally arise about preference betwixt the two different rules, when cases occur partaking of both their principles. For these reasons, I shall conclude my answer to the last objection in these words, That one rule ought to serve two principles, whenever it be the rule already established upon the one principle, and the other principle cannot afford a rule more agreeable to itself.

Having thus considered the three presumptions, shewn the improbability of one, offered a rule of decision betwixt the other two, and supported the propriety of its application, I shall now only detain the Court a few minutes longer, in stating the case in a view something different from what I have hitherto proceeded; though, I flatter myself, equally agreeable to truth, and consider it as a question, Who was the father's representative at his death? If the father died first, the daughter was; if the daughter died first, the nephew was: As to the third position, of neither surviving, its improbability puts it out of the question. Here the probabilities being equal, and no other grounds of preference occurring, surely the relation of daughter to father, so much nearer than that of nephew to uncle, might safely be allowed to turn the scale in her favour. If so, this view of the case gives additional

tional weight to all my former arguments, and the daughter's maternal uncle stands entitled to the personal estate in question, as well in this as in all the other views wherein I think this case can be considered. This, however, we submit to the consideration of a Court, whose decision, I am confident, will pronounce unto which side Equity itself inclines.

ARGUMENTS in Favour of the REPRESENTATIVE of the FATHER.

Mr LORD,

THIS extraordinary case, of a claim to a considerable personal estate, founded on a bare presumption, that a daughter cast away in the same vessel with her father, must, because she might probably have outlived her father on shore, have been able either to have holden her breath longer, or have swallowed more water before she was suffocated by the sea, than he could, has, I presume, raised too much attention, as well as surprise, in this Court, to make a repetition of it in the least necessary.

I am also confident, my Lord, that the arguments brought under a notion of supporting such a claim must, from their promised singularity, have been too much the object of your notice, to have suffered an observation I am now going to make to have escaped you. But, however, in order to expose to less attentive minds the extraordinary

extraordinary artifice necessary to uphold so extraordinary a claim, as well as to convince those Gentlemen who have undertaken it, that every body is not so full of presumption as they might wish. I shall here take occasion to remark, that every argument they have framed, every supposition they have obtruded, has absolutely presupposed one very material proof to have preceded it, without which it must sink for want of ground to rest upon.

The proof I mean is this, that the case before us either absolutely cannot, or at least ought not, to admit of any other means of decision, than some one or other of the presumptions which they have been so kind as to state, and with so much assiduity offer to our consideration.

We have here a case which, it seems, may admit of three different presumptions. Does it follow, therefore, that one of the three must be admitted? Is it clear that no other means of determination exist? If we allow there may be some other means to direct the succession of property upon this occasion, than mere presumption, the question then arises, Why is presumption preferable? If these things had appeared so evident as to need no proof, even that very circumstance, I am persuaded, would have furnished them with sufficient occasion to have hinted to us, at least, the firmness and stability of
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that foundation upon which their whole pile of reasoning was built. Had these things, on the contrary, appeared to them of a doubtful nature, is it not surprising that Gentlemen who have shewn themselves so minutely capable of the most abstruse, the most refined and abstract difficulties, should have passed over a point so essential to them as this, without a single syllable to clear it up?

This leads us to examine what it is they have done. They have proved, (it is true,) that of three presumptions by them stated, one is preferable to the other two. Have they shewn that this has any thing to do with the present question? They might just as well have proved that three angles of a triangle are equal to two right angles; and it would as effectually have decided our dispute, unless they had likewise shewn that the present case necessarily depends on presumption at all for its determination, more than it does on the said equality of angles; and that it is impossible we should arrive at any decision at all in the question before us, but by one or other of those three presumptions. Grant them but this, and their arguments have some bottom; but what would they say should any be found so ill-natured as to deny presumption any admittance at all? Indeed their arguments might still be allowed their logical merit, though (under that supposition) nothing at all to the present purpose,

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However, it certainly would have been a piece of reasonable precaution in the Gentlemen to have prevented any rude attempt of that sort, by shewing us on what ground they have taken for granted a fact, upon the certainty of which every argument they offer proceeds. This, however, they have omitted; and the only probable reason that I can assign for it is, their desire that it should be admitted and passed over with as little notice by us as by themselves.

How flattering soever their hopes might have been on this occasion, I must profess myself so little inclined to indulge them, that before I pay the least attention to any one of their arguments, I shall examine whether the fact on which they are built is or is not true; and hope to save myself the after-trouble of any such attention, by making it appear, in the course of a few observations, that these Gentlemen were either deceived themselves in the first point assumed, or thought it necessary that we should be so.

I shall begin my inquiries with a question, Whether facts did first call forth laws, or laws were prior to facts? Do not facts, in their very nature, precede laws? Is it not to them the creation and necessity of laws are owing? Was it not to regulate facts, and their various consequences, that laws were instituted? If laws, therefore, were made for facts, and not facts for laws,

laws, upon what principle of nature or reason are laws to create, presume, or distinguish betwixt facts unknown, unless in immediate consequence of such as are known, or to avoid running counter to the general tendency and course of things manifested to us by comparing together apparent circumstances, and arguing from known causes to their necessary effects, or *vice versa*? If any other motive can be admitted for this creative faculty of law to take place, it certainly can be nothing less than an event, (if such a one occurs,) where, if something is not established on presumption only, confusion and uncertainty at least, if not some injury, must necessarily ensue. Surely nothing less than such an event can justify the exertion of so capricious a power.

Now, if it be really more agreeable to the nature of things, to the happiness of society, and consequently to reason itself, that facts should call forth the operation of laws, than that law should wantonly assume facts, in order to its own unnecessary operation thereon, it follows, that natural means exist by which facts may be ascertained, and the law satisfied of their existence; for a fact, unless it can be known to have existed, is not to us distinguishable from another, which might equally (as far as we can judge) have existed, but really did not; such a fact differs not from possibility; and

and if the law is to take facts on that ground only, it matters little whether we have any laws or not, since in many cases the latitude of presumption will be so very great, as to compel us into a persuasion, that such cases are no longer the objects of law, but of a whimsical arbitrary caprice.

Now, it is evident, the methods by which we can establish the existence of facts are two, *viz.* Evidence, or, in default of that, presumption; the first certain, and leading, in general, directly to truth; the other uncertain, less direct in its path, and commonly, in some degree, liable to error.

Prefumption, however, is of two kinds; the one probable, the other barely not improbable; the one, though uncertain of its aim, yet steady in its pursuit; and guided by the light of circumstances, for the most part leads us round to the neighbourhood at least of truth; the other, totally uncertain, blind to its own purpose, in the midst of darkness, undirected by the glimpse of any testimony whatsoever, stumbles indiscriminately on truth or error, without the most faint attraction to one more than the other. Can it be suspected that a method so precarious and uncertain in its event, so equally open to injustice itself, as the presumption last described, can

can ever be adopted as a means of decision, by that law whose great, whose professed end is certainty and truth, in any one case where an alternative exists? Certainly not, or law ceases to support the glorious ends itself so openly professes.

Having established, as I hope, upon the strength of the foregoing considerations, the certainty of this proposition, *viz.* That law will never proceed upon mere presumption, unless compelled to it for the sake of avoiding confusion or injury of some sort or other, my next endeavour shall be, to convince the Court, that neither of those motives can possibly influence the decision of the present case. To this end, I shall consider, *First*, What must be the state of things before presumption is admitted at all. And, *Secondly*, What are the consequences which must necessarily follow the instant we open the door to so unnecessary, so violent a measure.

The Court here beholds, on the one hand, a right founded on the certain, the known possession of an uncle; on the other, a claim raised upon the uncertain, the unknown possession of a niece. The first shews a fact for its foundation, *viz.* The uncle dying possessed; the last supposeth a fact to raise itself upon, *viz.* The daughter dying possessed. Is it not clear, therefore, if we strike supposition of a fact, *i. e.* Presumption,

sumption, out of the case, the right remains unimpeached, and consequently the nephew's title uncontroversible?

Thus we perceive the consequence of this unfortunate event is already clear and decided, without any presumption at all; no sort of confusion exists to call for its assistance; and that, in fact, if any uncertainty can or does arise, we owe it entirely to the officious intrusion of so improper, so blind an arbitrator.

Having considered the state of things before presumption is admitted, let us now see what alteration her impertinent tale will occasion.

Here is a nephew, who, but for presumption, has a certain title: Here is another person, who, but for presumption, can shew no title at all. Shall it then be admitted a dispute whose title is the best? or shall apparent right be overthrown and rejected, to create and establish one which is not apparent, because presumption tells us it might have existed, though it now appears not? Is this the avoiding confusion? Is this the preventing injury to any one? If it is, let presumption be hearkened to; if not, either deny the ends of law to be certainty and justice, or let it denounce abhorrence of the enemy to both.

I flatter myself the Court by this time is satisfied, what were the motives which prevailed on the Gentlemen on the other side to take for granted the principle upon which they set out; the difficulties to be engaged in the support of it were too serious to be trifled with, and the arguments which might occur for that purpose too trifling to be serious with. I am also in hopes, that the considerations I have laid before the Court have been sufficient to convince them, that law and mere presumption are totally incompatible, except when forced together by the extraordinary circumstances of some few cases; and that it appears, from the most candid and impartial view, that the present case by no means falls (nay cannot even be forced) under the description of those few; and consequently, as presumption is the only ground upon which the opposite claim can or pretends to step, whereas our right necessarily and indisputably exists until attacked by such presumption, the law cannot hesitate a moment in what manner to decide betwixt a right grounded on a known fact, and a claim suggested by captious presumption.

It is upon arguments of this strong complexion our cause chooseth to rest itself; and, by such only, I trust, can the opinion of this Court be influenced. Others, it is true, we have, which, however, I shall only just brandish for argument sake; for although it may appear needless for me

me to enter into the merit of arguments built upon the necessity of making use of presumption, after I have shewn that no such necessity exists in this case; nevertheless, as I am afraid the Gentlemen may draw an inference from my silence on that head, to which I can by no means assent, and flatter themselves into a belief, that their arguments were unanswered, only because no answer could be found, I will, for the sake of argument, admit their own principle, and let presumption into the present case, just to see whether it would run so directly to their side of the question as they are willing to persuade us it does.

They have shewn us, that of three presumptions which the case admits of, two only claim our attention. The equality of these two calls in a rule of decision, which, upon their own arguments, there is no other reason for applying to the case before us, than because it is a rule already established; and though it is upon other principles than those of the present case, yet as it is equally agreeable to the very principles of this case as any other rule can be, let it be applied, they say, in preference to any new rule, because such preference will avoid a needless multiplicity of rules. I grant their preference is just; but what if I should shew them there is no necessity for calling in any rule at all upon the present occasion,

occasion, for that the case itself will furnish us with one, two, or three circumstances, either of them sufficient to direct our choice betwixt the two equal' presumptions (as they call them), even of itself, much more so when it is found all the circumstances concur in favour of one and the same presumption..

The presumptions they have shewn us are nicely balanced; the one to support the nephew's right, the other to raise up one to the uncle. Here it is that the different operations of the presumptions, as well as the grounds for them, ought to enter the balance, and that scale in which is sustained the preservation of an apparent right will certainly preponderate, when opposed to that which contains the raising up a non-apparent one. This is a turn which equity must give the scale, upon this principle, that it is more conducive to the general good of society to waive a right whose existence does not appear, than to violate and trample down one whose existence does appear. The first act carries not even the appearance of wrong; the last does; and certainly where one of two measures must be pursued, and it is impossible to determine which of them is really wrong, a court of justice will naturally consider itself bound, for example sake at least, to prefer that which, of the two, least appears so. Thus we behold equity itself
anti-

anticipating the necessity of any other rule, and clearly pointing out which of the two presumptions we ought to prefer.

Contented, as I should think the Gentlemen might be with the motive of preference last discovered, I will, however, waive the superiority of apparent right to doubtful claim, and take the case in a second different view.

Here are two claims, we will say, founded on two equally probable presumptions: How are we to decide betwixt them? Why, first, a very natural question arises, Can either of the claims be supported on any other grounds besides its respective presumption? The answer is, Yes; there is one of them that may be equally well founded on a known fact, *viz.* The father's having died possessed; so that we have one claim founded upon a known fact, as well as its respective presumption, in opposition to another supported by its equal presumption only. Is it possible to doubt which of the two ought to stand? or has certainty lost its esteem in law? Nay, to proceed still further against ourselves, and give up every advantage derived from the necessary interposition of equity, or the actual evidence of a known fact, we will once more turn the case about, and consider what else can be brought in favour of one presumption more than the other,

without recurring to any arbitrary rule of decision whatever.

Supposing, then, the two equal presumptions as before stated; will not, I beseech, the bare possibility of the father and the daughter's having died together, (that is within the duration of an instant too small for our senses to divide,) be sufficient to turn the scale betwixt two claims so nicely balanced; and though by no means fit to be made itself the grounds of claim, yet be of weight enough to direct our preference to that claim which it favours, when there is nothing to countervail it on the other side? For the fact is really this (though not attended to by our opponents, as not at all to their purpose); our right depends not only on one equally probable fact, as their claim does, but also upon another possible fact, which their claim does not; and it is very certain, that of three possible facts, if there are two equally probable, that the chance in favour of one of those two, added to the chance, however small, of the third, produceth a chance greater than the chance of the remaining equally fact alone. Now two chances are on our side, one of which the Gentlemen have proved to be equal to the chance on their side; our two therefore together must be greater than their one alone.

Thus it is evident, that when we have admitted presumption in the room of certainty, and excluded equity, and the testimony of a known fact from the question, still does presumption itself meet with such unavoidable direction from the very circumstances of the event, as, in my opinion, must now convince the Gentlemen on the other side, they might just as well have spared us the arguments they have framed, as they have the foundation on which they raised them.

It now, I hope, sufficiently appears, (if not originally evident,) that whether we consider the general nature and end of law itself, or the particular state and circumstances of this case, presumption can shew no title to footing here, seeing, that so far from obviating an uncertainty of any kind, the very admission of it furnisheth immediate grounds for contest which of several positions shall be preferred; and so far from stepping between injury and any man breathing, that the overthrowing an apparent, and upon its ruins establishing a non-apparent right, is the very first fruit of that presumption, which its skilful advocates have endeavoured to prove the best which the case admits of.

That even were it possible to suppose, that whim should for once assume the seat of law, certainty give place to uncertainty, and equity
itself

itself be violently trampled down; even then we have seen the absolute impossibility of discovering such a thing as a presumption, equally balanced betwixt probability and improbability, in the case; every concession that can be made still leaves the greater probability on our side, and presumptive coincides with apparent right.

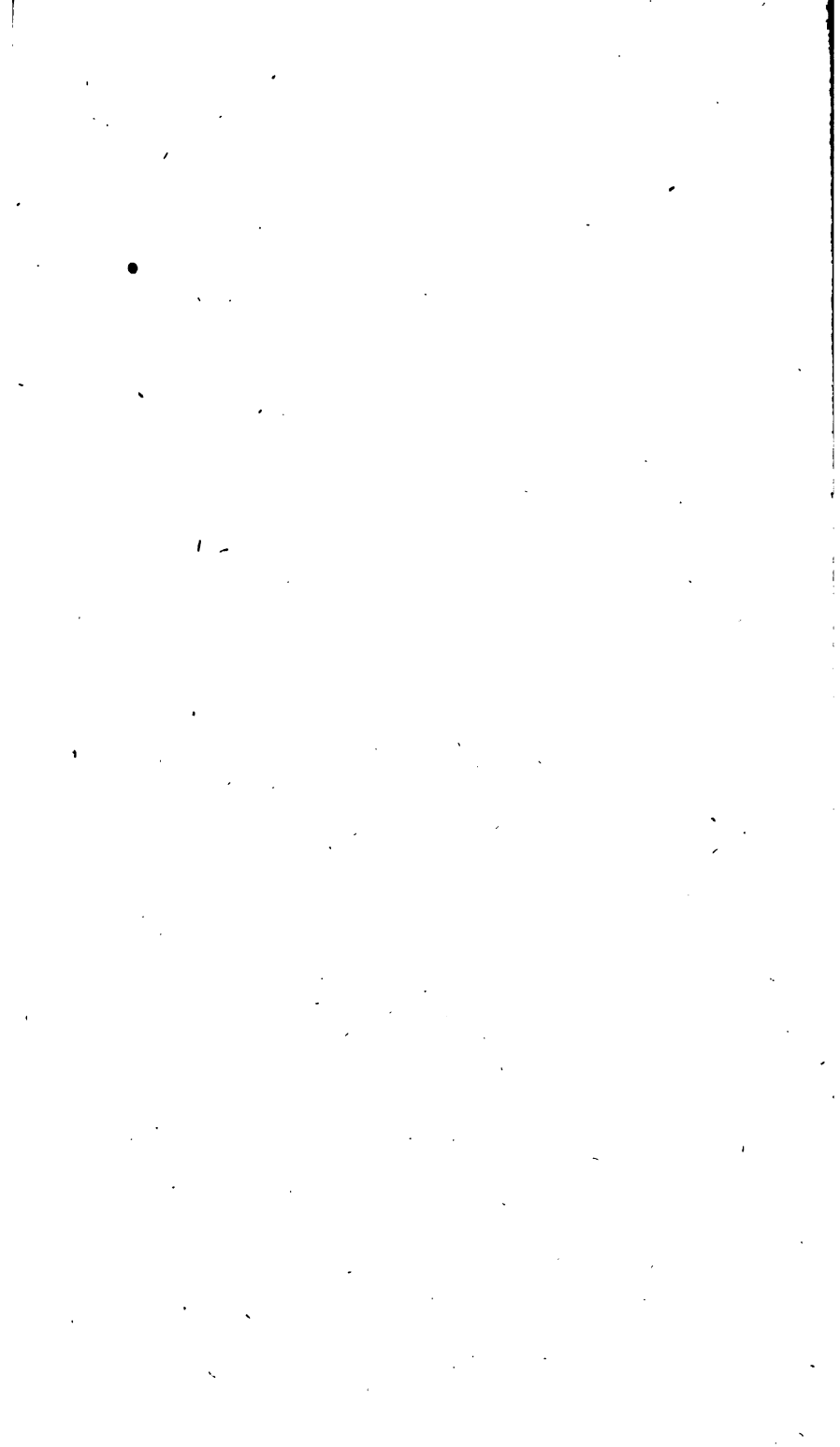
Compelled, therefore, as I am, to consider this case as on the one hand a right built on the positive evidence of a known fact, which is, that the father died possessed; and also (were such support necessary) capable of being supported by the more than indifferent presumption that the father did not die first; attacked by a claim on the other, a claim certain only in its own want of a known foundation, favoured by no one collateral circumstance in the world, having nothing in nature upon which to make its appearance in this Court, but the litigious whispers of an idle insupportable presumption; I am bold (I must confess) to expect the opinion of the Court, and can no longer prevail on myself to withhold them, by calling their attention to any further arguments, from that decision, which, I presume, they are already so desirous of pronouncing.



C A S E S

A N D

O P I N I O N S.



C A S E S

A N D

O P I N I O N S.

UPON the interest of a bankrupt in a vested remainder in tail in his wife, expectant upon a previous freehold in another person, and the effect of a proposed assignment by the commissioners, after a fine levied, and recovery suffered by the bankrupt and his wife, when the lands fell into possession, subsequent to his having obtained his certificate.

A., by will, gave his estate to his son *F.*, and the heirs-male of his body; remainder to his three daughters, and the heirs of their bodies respectively, as tenants in common; remainder over.

B.

B. (one of the daughters), after the death of the testator, married C., who became a bankrupt, and obtained his certificate in 1776.

F. (the son) died in 1777, in his infancy, unmarried, and without issue.

C. and his wife then levied a fine, and suffered a recovery of their *one third* of the devised estate*.

I HAVE attentively considered the above case, and opinions upon it; and, in respect to the first part of the query now proposed to me, namely, What estate Mr. C. had in his wife's land, by virtue of the limitation to her in her father's will, at the time of his bankruptcy? and whether it was such an estate as was assignable by the commissioners? I cannot help being of opinion, that Mr. C. had, in right of his wife, a *vested* estate in her third part of the lands in question, during the joint lives of himself and his wife, in

* [~~at~~ Those words which, in the Opinions, are printed in Italics, are distinguished in the manuscripts by a line under them.]

remainder expectant, on the decease and failure of issue male of Mrs. C.'s brother. That Mrs. C. had a *vested* remainder in tail, in this third part, cannot be denied; and I do not see how a feme covert can have a *vested interest* in lands, whether in possession or remainder, independent of and distinct from her husband, without the intervention of a trust for her separate use. If she were legally entitled, her husband was entitled in *her right*. His title being in *her right*, was of the *same* quality, though (so far as he was beneficially interested) not of the *same quantity or extent* as her's. Her right, in respect to *quality*, was *vested in interest*, though not in possession. In quantity it was an estate of inheritance. His title, being in *her right*, was of the *same* quality, and consequently *vested in interest*, but less in respect of *quantity*, (so far as respected his beneficial interest,) as not extending beyond their *joint lives*. Her right to the *whole remainder* being *vested*, that part or portion of *her right*, which was confined to the *joint lives of herself and her husband*, was as much vested as the residue of such remainder; and it was this part or portion which her husband became beneficially entitled to in *her right*; so that if it was not vested in him, it must have continued vested in her, during their joint lives; for somewhere this remainder must be vested during their joint lives, and it could be no where but in one of them; and therefore unless we admit the wife to have had this estate vested in her during

their joint lives, exclusive of her husband, we must allow it to have been vested in him in her right. To me it clearly seems that it was so; and I have no doubt that he might, before his bankruptcy, have granted such estate by lease and release, or bargain and sale inrolled, even without the concurrence of his wife, so as to entitle his grantee thereto, during the joint lives of him and his wife, after the possession had fallen.

It is observable the statute 13th *Eliz. c. 7. s. 2.*, enacts, That the commissioners shall be empowered to assign over all that the bankrupt might *depart withall*. Now, I conceive, it cannot be disputed, that the bankrupt might have departed with this interest in his wife's estate at the time of the commission. If he could, it follows, that the commissioners might assign it for the benefit of the creditors; whose benefit the bankrupt laws have expressly in view; for the statute 21 *Jac. I. c. 19. s. 1.* declares, That the statute relating to bankrupts shall in all things be legally and beneficially expounded for the relief of *creditors*. Upon the whole, therefore, I conceive, that it was such an estate as the bankrupt, at the time of the commission, was entitled to in remainder, during the joint lives of himself and his wife; and that its falling afterwards into possession, was a mere change of its state, in respect to advantage and *profit*,
and

and not in regard to right or title; and consequently was not an acquisition of the estate or right itself, but only of the profits as flowing from the estate or interest before subsisting. And therefore I am of opinion, that although the commissioners have not assigned the estate, yet the power of assigning being in them at the time of the bankruptcy, and no limits being set to the time of executing that power, it still remains in them, and they may and ought to assign the estate by bargain and sale to the assignees; and that such bargain and sale will accordingly entitle the assignees to the rents and profits of the estate in question, during the joint lives of the bankrupt and his wife.

And as to the latter part of the query proposed to me, namely, Whether the fine and recovery levied and suffered of the said undivided third part of Mr. and Mrs. C.'s are valid? I incline to the opinion, that they are good and effectual, in every other respect, than as against the creditors, in respect of the husband's interest in those lands, during the joint lives of himself and wife; for, as I am informed, there had never been any bargain and sale by the commissioners, there was nothing to take the legal freehold out of the husband, or prevent its being vested in him *jure uxoris*, at the time of making the tenant to the præcipe. It therefore

fore passed to such tenant, and the recovery being suffered against him, I see nothing to impeach its validity in respect to barring the estate tail and remainders, unless a subsequent bargain and sale by the commissioners can be considered as entirely supplanting it, by vesting the estate in the assignees, from the time of the bankruptcy, by relation. But it rather seems to me, that the relation of the bargain and sale to the time of the bankruptcy, is only such as to avoid all mesne acts or incumbrances; as against the assignees and creditors only; but not to invest the assignees with the legal estate, or actual property, as from that time, or enable them to maintain any actions grounded upon the supposition of their having been invested with such actual estate or property, antecedent to the perfection of the bargain and sale, by the inrollment thereof. This, I think, appears from the opinions of the Court in the cases of *Bennet v. Gandy*, *Carth.* 178. *Show.* 200. *Berris v. Bowyer*, 2 *Show.* 156. 2 *Fo.* 196. *Kiggil v. Player*, 1 *Salk.* 111. So that I think a bargain and sale by the commissioners would not avoid the estate of the tenant to the præcipe, made before such bargain and sale, otherwise than against the creditors; but leave that, and the recovery, just in the same plight, and of the same effect and validity in all other respects, and against all other persons, as it was before such

such bargain and sale. It seems to me to be quite sufficient, that there was a good tenant to the præcipe at the time of the recovery, as in the case where a common recovery was suffered against a tenant to the præcipe made by fine; the fine was reversed, yet it was held a good recovery; for there was a tenant to the præcipe at the time. 2 *Salk.* 568. So in the case of a recovery by an alien, and, after office found, alien dies without issue, yet the recovery was good against the remainder. 4 *Leon.* 84. So it seems, that a person attainted of felony is a good tenant to the præcipe till office found, though the office has relation to the attainder, so as to entitle the King to the profits against all mesne incumbrances. Upon the whole, therefore, I incline to the opinion, that as here was a good tenant to the præcipe at the time, the recovery was good, and the fine, I conceive, would have barred the issue, and acquired a base fee to the wife, independent of the recovery.

As to what is stated of there being issue of the marriage at the time of the bankruptcy, I do not conceive it will alter the case, or entitle the commissioners to assign any greater interest in the estate than during the joint lives of husband and wife; for the possession did not fall till after the certificate, and the right to the tenancy
c by

by the curtesy was not even initiate till the wife's title to the seisin of the freehold and inheritance in possession took place. So far, therefore, as respects his title to the tenancy by the curtesy, I conceive it is a new acquisition since the certificate, and, as such, is not assignable by the commissioners.

THAT

THAT the assignment from commissioners of a bankrupt tenant in tail, in remainder expectant on an estate for life in another person, will not bar reversions or remainders over.

I CONCEIVE that *A. B.* at the time he was declared a bankrupt, was entitled to a vested estate tail, in remainder expectant on the decease of his father and mother, in the lands in question; and such an estate as the commissioners might assign, and make a title to the assignees thereof; as against the *issue* of the bankrupt, but not against those in reversion or remainder; and that the assignees can make the like title thereto, and no greater; that is, a title in base fee, determinable on failure of issue male of the bankrupt, in remainder expectant on the decease of his father and mother.

This opinion is founded on three principles: *First*, That the assignees can make no better or more extensive title than what the commissioners could make to them: *Secondly*, That the commissioners

missioners could make no better or more extensive title than the bankrupt himself could have made at that time, by fine, recovery, or otherwise, in case he had not committed any act of bankruptcy: *Thirdly*, That the bankrupt himself could not, at that time, have made a title good against those in remainder, without the concurrence of the tenant for life. If these principles be true, it follows, that the assignees cannot now make a title good against the persons entitled in remainder. Before the act referred to* in the above case, the commissioners could not make a title to *intailed lands* against the *issue in tail*, or those in *remainder*. That act, as I understand it, enabled them to make just such a title as the bankrupt himself might have done; therefore, if *he* could not, without the concurrence of the *tenant for life*, by recovery or otherwise, bar the *remainders*, how can they do so? If *they* could not, there appears nothing to enable their assignees to do it. It seems just to the creditors, that the commissioners should, for their benefit, have power to make a title to all the estate, and bar all the persons which the bankrupt himself was capable of barring. But it would be a stretch upon the rights of other persons, if the commissioners were capable of barring those whom the bankrupt himself could not.

* 21 Jac. I. c. 19. s. 12.

The conveyance made by the commissioners is to be good against the bankrupt, his heirs and issue, and all persons whom the bankrupt himself might, by common recovery, or other means, debar of any remainder, &c. Now, could the bankrupt, in this case, at the time of the conveyance from the commissioners, bar the remainder by a common recovery? The answer is, *he could not*. He indeed, *with the concurrence of the tenant for life*; that is, he, and the tenant for life, might have done it by recovery; but he alone could not do it by recovery, or any other means. But he, by other means, namely, *a fine*, might bar his issue. Besides, that the statute expressly makes the conveyance of the remainders valid against him and *his issue*: Therefore I conceive the conveyance by the commissioners was good against him and his issue, and no further.

Suppose a tenant for life, remainder in tail to a merchant or tradesman, remainder over to others; if the tenant in tail in remainder wants to bar the remainder, and the tenant for life will not concur, he has nothing to do but collude with any creditor to make him a bankrupt, and the business is done, though he should die without issue thirty years before the tenant for life. A man's creditors, by these means, would acquire a property over lands which the bankrupt himself never had, nor could acquire any possession

possession or usufructuary enjoyment of; and this to the prejudice and injury of third persons, whose estates it was out of the bankrupt's power himself to bar or deprive them of. Upon what principle are the creditors to be in a better condition than the bankrupt was, in whose place they stand, or to be entitled to a property over which he had no power.

As to presuming the concurrence of a tenant for life, and, upon that score, considering the commissioners as capable of doing all that the bankrupt might have done by such concurrence, there is no ground for it. The tenant for life may be also entitled in reversion himself, and his younger children may be entitled in remainder, as in the present case: And can it be presumed, that he would join with an insolvent eldest son, in subjecting the estate to debts, incurred by his extravagance and dissipation, to the prejudice of himself and the rest of his family? Surely not. Under this view of the case, I cannot conceive that the assignees alone can make a title against those in remainder or reversion.

THAT

THAT a certificate under a commission of bankruptcy in *England* may be used as a defence in an action in the Courts of Judicature in the *West Indies*.

THE contrariety in the respectable opinions* stated, and accompanying this case, shews the difficulty of it. It seems true, that acts of parliament made since the settling of the plantations, do not bind them, unless expressly named; but it seems also agreed, that with respect to colonies acquired by conquest, or ceded to us by treaty, and which had laws of their own at the time, the antient laws remain until altered or changed by the King. *Vide 4 Mod. 225. 2 Salk. 411. 1 Black. Com. 105.* And if so, *Saint Vincent's* being acquired since the act of 5 Geo. II., will give that act no greater force in that island, than if it had been passed since the acquisition of it. But, if the bankrupt laws are of no force or effect at all

* See *Green's Bankrupt Laws*, 4th Ed. 260. for the opinions alluded to.

in the plantations, how comes it that the property of a bankrupt in the plantations is bound thereby, and vested in the assignees? which, I conceive, is admitted beyond controversy. If those laws extend to the bankrupt's property there at the time, Why not to his future property? And as they subject the former to the commission, Why not exempt the latter from his debts?

It seems to me, that the operation of the act, so far as respects the vesting of the property, or discharge of the debts of the bankrupt, in any of the colonies of *Great Britain*, depends on the question, Whether *all his property*, and *all his debts*, were intended as the objects of that act? If they were, then *his property* and *his debts*, wherever situated, or wherever due or recoverable, within the dominions of *Great Britain*, I apprehend, must be liable thereto, without regard to the general question as to the extent of such acts to this or that particular place, but in necessary consequence of the direct operation of such statute on the property and debts therein expressly described; all which, it cannot be disputed, may be bound by an act of parliament. If it be admitted, that the words of the act extend to the bankrupt's *whole property*, and to *all his debts*, his property and debts, in any colony or dependent state, I think, are as much included in that description, as if the particular place in
which

which they were situated, due, or recoverable, were actually named in the act. The question of locality is superseded, if the subject itself is bound by reference to something else independent of locality, as by reference to the person it concerns. When a man is divested of all his property, and that property vested in others by an act of parliament, his property, in any place where property will be bound by an act of parliament, seems to be bound as comprised in and ascertainable under the description of *his property*; and, *pari ratione*, I think, when an act of parliament expressly discharges a man from *all his debts*, the discharge extends to his debts in any place where debts are capable of being bound by an act of parliament, and consequently to the *recovery* of those debts: for it would be absurd to say it extended to *discharge those debts themselves*, and still left open the means for recovering them. I presume it is admitted, that the debts in question are discharged *in England*, and therefore irrecoverable here. This supposes those very debts to fall within the words, *all his debts*, in the act; and if the discharge of such debts does not extend throughout all places which an act of parliament can reach, it is not completely a discharge. I think it would be a lame construction of the act, to discharge the *same debts* in one place, and leave them subsisting in another, where the words express a general discharge of
of

THAT a feoffment by the assignees of a bankrupt will destroy a contingent remainder, and merge an estate for life in a reversion in fee, passed to them by the bargain and sale.

A. B., by will, says, " I give my messuage at
" C. unto my son D., for and during the
" term of his natural life; and from and
" immediately after his decease, I give and
" devise the same unto such of his child or
" children as, at the time of his decease,
" shall be his heir and heirs at law, and to
" the heirs and assigns of such heir or heirs
" at law for ever."

D. was the eldest son, had several children, and became a bankrupt.

As the limitation is restrained to *a child or children* of the son, being his heir at law, and does not extend to any other person who might happen to be his heir, in default of a child, I look upon it as a contingent remainder to the child

child or children answering that description; and consequently, that if the legal estate passed by the will, that is, if the testator was seised of the *legal estate*, and made no disposition over, in the alternative event of his son's having no child, this contingent remainder, being supported only by the estate for life in the son, who was his heir at law, might have been destroyed by fine or feoffment, and the fee absolutely acquired by him: But I do not know how to consider the bargain and sale from the commissioners, as operating with so much violence; as a bargain and sale from himself, I conceive, would not have done it. I think it would only have passed what he lawfully might, without any hurt or prejudice to those in remainder. The commissioners, indeed, are empowered, by act of parliament, to assign all that the bankrupt lawfully may depart with. But I rather think those words in an act of parliament are not to be construed to import any species of violence or injury to the interest of third persons, as the destruction of contingent remainders seems to be. But though I do not choose to consider the bargain and sale from the commissioners as destroying the contingent remainders to the bankrupt's child or children, to whom it was limited by the will, yet, as I conceive it passed the bankrupt's whole *estate or interest* to the assignees, *viz.* the estate for his own life, and the *reversion in fee*, which had descended to him, (as I presume,) I rather think, that

that such assignees, by feoffment or fine destroying the estate for life of the bankrupt, and merging it completely in the reversion, might destroy that contingent remainder, and thereby acquire the whole absolute fee. But this is a question to be well considered by the purchaser, before he ventures on the title. I always recommend to a purchaser to be cautious in accepting titles founded on the destruction of contingent remainders, on account of the litigation to which they are subject.

UPON a case similar to, and at the same time distinguished by, peculiar circumstances from those wherein a limitation to persons of a particular description, on a contingency, or at a future period, has been held to vest only in the persons answering that description, at the time of the happening or arrival of such contingency or period, and upon the words "next of kindred in blood."

By an indenture made previous to the marriage of *R. A.* and *M. Q.*, a sum of money vested in trustees, (being part of the intended wife's fortune,) was declared to be in trust after the marriage, that the interest should be paid to the said *R. A.* and *M. Q.* for their lives, and the life of the survivor of them; and after limiting it in trust for the issue of the marriage, and in default of such issue attaining *twenty-one*, it was declared to be in trust for whom she should appoint, in default of appointment, to the next of kindred in blood to the said *M. Q.*, in equal shares.

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The marriage took effect; there were several children of the marriage, who died infants, and the husband survived his wife.

As Mrs. A. herself was to have the interest of her fortune during her life, and also the power of disposing of it in default of issue of the marriage attaining twenty-one, I think it clear, that the limitation over in default of such appointment cannot be considered as vesting till her death. No period can be assigned for that purpose, between the time of the settlement and her decease; and if her next of kin at the time of the settlement had been the objects, they of course would have been ascertained. It could not be supposed she intended her relations to become entitled in *her lifetime*, without expressly saying so. Then, as to the question, whether by next of kindred is to be understood the persons answering that description at *the time of her death*, or at the *decease of her husband*, when the limitation it seems took effect in possession? I rather think the limitation vested at *her death*, when her power of disposition determined. It was a limitation constituted in the room of such disposition by her, and therefore, I conceive, was

to take effect in *interest* when her power of *disposition thereof* ceased to be exercisable; and this was a *residuary interest* in the wife's own fortune, reserved to herself and to her own family, (in default of issue attaining twenty-one); that is, to herself *quoad* her power of appointment, and to her next of kin in default of such appointment; and to prevent a *chasm* in the reservation of such residuary interest, I think it is to be considered as taking effect, on *her decease*, in the persons substituted in *the place of her appointees*; which appointees must have been ascertained by that time. Besides, that the intent of this limitation was clearly to *exclude her husband in favour of her own relations*; and therefore, I apprehend, *was to commence when his interest would have taken place*, if such an exclusion thereof had not been provided for, that is, at his wife's decease. All these circumstances, I think, concur in distinguishing this from other cases, wherein a limitation to persons of a particular description, on a contingency, or at a future period, has been held to vest only in the persons answering that description, *at the time of the happening or arrival of such contingency or period*. And therefore I choose to consider this limitation to her next of kin, as vesting at the time of *her decease*, subject to her husband's life-interest in the trust monies.

The remaining point of inquiry is, Who were the persons entitled under the description of *her*

next of kindred in blood at the time of her decease? Now, if this description of next of kindred in blood is definite and certain, and clearly applicable to and descriptive, in its legal sense, of certain persons, I see no room for resort to any rule of *construction* to explain or apply them.

In wills, where the limitations are, by general and indefinite terms, to *relations* or *kindred*, so as to leave the persons unascertainable from the description in its general unrestrained sense, it has been decided, that the construction shall be according to the statute respecting the distribution of intestates effects, and that the words shall apply and be restrained to the persons who would be capable of taking under that statute. But here the degree of kindred seems to me, not to be left to construction, but to be ascertained in the limitation itself, by the word *next*. The words *next of kindred* are not indefinite, nor too comprehensive to admit of the objects being easily ascertained. They expressly denote persons of a particular legal description, and ascertainable accordingly; and I see nothing to imply a different intention in the application of them in this case. I therefore incline to think, that the persons who were, at the time of the decease of Mrs. A., her *nearest of kin* in blood, were the persons entitled under that limitation, namely, Her sister B. C. and her

her brother *D. E.* ; for they were her *next of kindred*, the children of her deceased brothers and sisters being *one degree more remote* than her said brother and sister.

Under the statutes of distribution, it is true, *children of deceased* brothers and sisters of the intestate are let into shares with their uncles and aunts ; but that is not in their own original right as *next of kin*, but as *representatives of their parents*, by the express words of the statute. In the present case, no such representation is provided for ; and the persons claiming under the description of *next of kindred in blood*, I apprehend, must come within that description, since the limitation stands absolute and definite, clear of any reference to the statute, or course of distribution, as well as of any extensiveness in expression, to require any resort of this kind, for limiting the construction. If I am right in this opinion, it follows, that *B. C.* is entitled to one moiety of the money in question, and the personal representatives of *D. E.* to the other ; for the limitation is to the next of kindred in equal shares.

THAT a copyhold estate, surrendered to the use of a mortgagee, passed by the will of the mortgagor made subsequent to such mortgage, but before the admittance of the mortgagee, though no surrender was made to the use of such will.

THIS appears to me a case of some difficulty, and I am not apprised of any decision directly applicable to it. As to the question, Whether the testator had the legal or equitable estate in him at the time of the will? it appears to me, that, in strictness, the legal customary estate was then in him, as there had been no admittance of the mortgagee to take it out of him; for it is held, that until the admission of the surrenderee, the estate remains in the surrenderor. But still it was bound by that surrender, so that he could not dispose of it by any subsequent surrender, either to a purchaser, or to the use of his will, otherwise than subject to the title which that surrender had passed to the mortgagee, and which became complete, by the subsequent admission, from the time of that surrender itself. Lord *Mansfield*, in the case of *Roe*

Roe and Griffiths, 4 Burr. 1952, denied that the surrender alone made no alteration in the estate. He held it to be the conveyance of the ownership of the estate, and that the admittance was only mere form; that the surrender was a deposit in the lord's hands; that the land was bound by the surrender, and the admittance related to it; it was the shadow to the substance. That the case of *Benson and Scot*, 1 Salk. 185, was decisive; and he held the admittance by the lord, in that case, should relate back to the time of the surrender, and was only a completion of it; and that it was within the principle of those cases, where the whole of a conveyance should be taken together, and the several parts of it should relate to the principal part.

Upon these grounds, I think, it may be contended, that, after the admission, the title is, by relation, to be considered as having been in the same plight from the time of the surrender, as if the admittance had immediately followed it: That the testator had, at the time of his will, no other disposible interest than a right of redemption, which was no more the subject of a surrender, than a proper equitable or trust estate; and that the will operated upon such interest accordingly, without any surrender to the uses of it, as it would have done if the admittance had taken place immediately upon the surrender. I do not see how we are to deny the conclusion,

if we admit the doctrine of the surrender and admission operating as one complete conveyance, from the time of the surrender, so as to entitle the surrenderee to the estate by relation from that time; for when we consider the surrenderee as coming in of the legal estate from that time, we cannot consider both surrenderor and surrenderee as seised of the same estate at the same time; and when we consider the mortgagee as entitled by relation from the time of the surrender, just as if the admittance had accompanied it, I think we must consider him as holding the lands from that time, subject to his mortgage, upon the same trust as if he had been admitted at the time of the surrender; in which case, it is clear, he would have held it in trust, for the devisees thereof, under the mortgagor's will, without any surrender to the use thereof. For these reasons, I incline to the opinion, that the right of redemption passed to the testator's widow by his will. But, supposing this opinion wrong, and that it did not pass, for want of a surrender to the use of the will, then, as to the question, Whether a court of equity would supply the want of it in her favour? I rather think it would not, as the heir at law appears to be totally disinherited; though otherwise, I should think, it would. *Vide 1 Eq. Cas. Abr. 124, Ross and Ross.*

THAT

THAT the steward of a manor is at liberty to refuse accepting from the heir a surrender of a reversion, expectant on a tenancy for life in a copyhold estate, until payment of the fine due by the custom on the descent.

IT seems agreed, that the admittance of a copyholder for life, is the admission of those in remainder, so as to vest the estate, but not prejudice the lord of his fine, which he ought to have by the custom. Vide 4 *Co. Rep.* 22, 23. *Co. Com. Cop. s.* 56. *Cro. Jac.* 31. 5 *Mod.* 306. And the same doctrine is extended to the admittance of a termor; 1 *Ventr.* 260. 1 *Mod.* 120. 1 *Bulst.* 42. And it has been held, that a fine is not due for a remainder, unless there is a special custom for it; 3 *Lev.* 308, 309. And that the rule of the admittance of the particular tenant, not prejudicing the lord's fine, is to be understood, where such fine is *due by custom* for the admittance to the remainder; *ibid.* It has also been held, that the lord may assess one fine for

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for the particular estate, and another for the remainder; but that if a fine is assessed for *the whole estate*, there is an end of the business; though if it be assessed only for *the particular estate*, the lord ought to have another. Vide *Blackburne v. Graves*, 1 *Ventr.* 260. 1 *Mod.* 102. 120. From these authorities, I infer, that where there is no *special custom* to warrant the exaction of a new fine, on the admittance to the remainder, and the lord does not divide or apportion the whole fine usually due on the admission to the whole fee, *between* the particular estate and the remainder, but takes the whole customary alienation fine upon the admittance of the particular tenant, no further fine is due from the person in remainder on its coming into possession. Vide *Barnes v. Corke*, 3 *Lev.* 308. *Cro. Eliz.* 504. Nor do I conceive, that any new admittance to the remainder can be requisite in such case, as it appears to be of no other use than to enforce the payment of a fine when due. Vide *Cro. Jac.* 31. 1 *Mod.* 102. Therefore, if the present case had respected a tenancy for life, with remainder in fee thereon depending, without any apportionment of the whole alienation fine by the lord, between the estate for life and the remainder, or any special custom requiring a new fine from the remainder-man, I should have thought the admission of the tenant for life a sufficient admittance of the remainder-man; and that the lord could have required

no farther fine from, nor consequently admission of him. But the present appears not to be the case of a tenant for life and remainder-man, who have but one estate in law; I understand it to be the case of a devisee, or tenant for life, and the heir at law entitled in reversion; for the ulterior devise being in fee to the heir, was, I apprehend, a nullity; and he is entitled by descent, and not by the will: And, I apprehend, the admission of the tenant for life, is no admission of the heir to the reversion, to disappoint the lord of the fine he may be entitled to on a descent. Indeed, the estate for life, and the reversion, not being several parts of one estate arising under the will, as a particular estate and remainder would be; but the one being the only estate created by the will, and the other part of the old pre-existing estate, it seems difficult to consider an admission to the one as any admittance at all to the other. The reversion, indeed, requires no admission for the mere purpose of alienation, but only in respect of the lord's fine due upon a descent. And though the heir is to most purposes, particularly as to strangers, tenant before admittance, yet he is not so to all purposes; because till then (as Lord Coke says) he is not complete tenant to the lord, *no further forth than the lord pleases to allow him for his tenant.* Vide *Co. Camp. Cop.* f. 41. Hence it seems to follow, that the lord may (if he please) refuse his surrender, before admittance

admittance and payment of the fine ; though, if he accepts it, such surrender is good ; and this conclusion agrees with what Lord Coke (in the place I have cited) says, that the heir, before admittance, may surrender into the hands of the lord, to whose use he pleases, *satisfying the lord his fine due upon the descent*. And this seems to be the meaning of the resolution in *Browne's case*, 4 Rep. 22. b., that the heir may surrender to the use of another, before admittance, but not to prejudice the lord of his fine due by the custom upon the descent.

There can be no question, that the heir is compellable (if the lord please) to come in and pay the fine due on a descent ; and it is said, that where the lord is to have a fine, there must be a new admittance ; vide *Moor* 465. If so, I should think the lord may (if he please) refuse a surrender by the heir, until he has paid the fine on the descent. Indeed, if he could not, the lord might be disappointed of his fine ; for after the accepting of the surrender tendered by the heir, though a conditional one, and the surrenderee's being admitted on the forfeiture of the condition, who of course could be liable to only the alienation fine on such an admission, where would be the lord's remedy for his fine upon the descent ? And though the lord cannot compel the heir to come in and be admitted, and pay his fine, during the
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the life of the tenant for life, yet if the heir require to surrender before, I apprehend, the lord may refuse accepting his surrender until he pay such fine; for otherwise he may be disappointed of it, by accepting the surrender from the heir to the use of a stranger, who would be entitled to admission under it, (even though conditional, if forfeited,) upon payment of the alienation fine only. It, therefore, upon the whole, appears to me, that the steward is justifiable, in the present case, in refusing the surrender from the heir of his reversion, until he has been admitted, and paid the fine (or at least paid the fine) due by the custom on the descent to him. I conclude, that the fine paid by the widow, was only in respect of her estate for life.

UPON

UPON the mode of transferring an executory freehold interest in copyhold lands.

THE case of *Porter and Bradley*, 3 Term Rep. 143, I think, will not admit of any reliance on the construction of the devise to Mrs. *A. B.* giving her an estate-tail. The safer way will be, to consider it as an estate in fee, subject to an executory devise over to *C. B.* in fee, in the event of her sister's death without leaving issue *then living*. Under this view of the case, Mr. *F.* and his said wife, heretofore *A. B.*, together with her sister *C. B.*, may, by all joining in a conveyance by lease and release, and a *fine* of the freehold part, make a title thereto.

But their power of making a title to the copyhold is not quite so clear, as a surrender has been thought not to operate by estoppel, so as to bind a future executory interest in copyholds, as a fine does in freeholds. But I rather incline to think, that if Mr. and Mrs. *F.* and her sister all join in a *contract* to convey the copyhold part of the

estate to the purchaser, for an adequate valuable consideration, and, in pursuance of that contract, they join in a surrender to the use of the purchaser and his heirs, and then *C. B.* release the executory limitation, and all benefit thereof, and all her claim and title under it, to the purchaser, after his admittance under the surrender, *C. B.*'s heirs will be bound, and the purchaser thereby acquire a title to such copyhold. This conclusion depends on principles too long to be here detailed; but such is the inclination of my opinion.

UPON

UPON the principle on which the usual qualification of the covenants from a vendor depends, and how that principle applies to the covenant for the production of title-deeds.

THE only difference in opinion upon this case arises, I apprehend, from the retention by Mr. Q. of the deeds of conveyance to him; for if those deeds went with the title to the present vendee, I conceive, there could be no requisition on his part of the covenants now in question.

Regularly, a vendor who purchases lands himself, with proper covenants from those who convey to him, cannot reasonably be required to covenant further than against himself, and those claiming under him. This is a practice founded in reason, where the vendee obtains the full benefit of all the covenants in the conveyance to the vendor to the same extent as his vendor has them, by obtaining the possession of the deeds containing

containing those covenants. When the vendor has parted with his means of claim or remedy against his grantor for breach of his covenants, and transferred them to the purchaser, by delivery of the deeds, and such vendee comes into the vendor's place in that respect, by the acquisition of such deeds, it would be unreasonable that the vendor should make *himself liable* for any such breach. He, by departing with the means of remedy or compensation, must be understood to have discharged himself from, and the vendee, by accepting those means, to have taken upon himself the peril or risk of such breach, and the duty of enforcing its remedy or compensation.

But this principle, I think, does not apply to those cases where the vendor does not depart with, or the vendee acquire the deeds containing the covenants for the title against the acts of such grantors. Whilst the vendor retains in his own hands the immediate means of indemnity, which he thought proper to require of his grantor, it seems but reasonable that he should engage for the like indemnity to his own vendee, and rely upon the indemnity he has retained for his own counter-security. It is not, I think, sufficient to say, that the covenant to produce his purchase-deeds will entitle the vendee to the benefit thereof, when produced. Such covenant cannot insure

the production of them, which may be prevented by accidents, for which the vendor, in whose custody the deeds are, ought to be the sufferer, rather than the vendee, who, by not having such possession, could not, in any degree, be accessory to the occasion of their loss, or by any means or care have prevented it. There seems more reason, on the other side, to say, it is sufficient for the vendor, that, when called upon by the covenants entered into by him to the vendee for enjoyment, &c. he has his remedy over to the same extent upon his grantors, of which, as he retains the means in his own custody, he is bound to look to the preservation of those means, and liable to the resort to and due enforcement of them, and to bear the consequence of their loss.

Upon the whole, therefore, the present case does not appear to me to fall within the general rule, where the vendee acquires the custody or possession of the vendor's purchase-deeds; and that it is but reasonable that a vendor, retaining in his own custody the only means of indemnity against the acts of his grantors, should engage to indemnify his vendee to the like extent. He cannot, I think, fairly object to his vendee's requiring an indemnity against the acts of the same persons, and to the same extent as he himself required; nor, whilst he retains the means of enforcing such indemnity, deny his
reliance

reliance upon, or refuse to subject himself to a resort to those means. Withholding his own indemnity from the possession of the vendee, it is but fair he should give him the possession of an equivalent one. I therefore think Mr. Q. may be required to covenant for quiet enjoyment to the extent required on the part of the vendee, subject to such a qualification as I shall afterwards mention.

The same principle, I think, applies to the covenant for the production of the title-deeds. Where a vendor retains to himself the title-deeds, or the means of resorting to and obtaining their production, it seems but reasonable that he should covenant for their production to his vendee; for though the deed itself, containing the covenant for production of them from the grantors of the vendor, if it extends to his assigns, as usual, would, when obtained by the vendee, I think, entitle him to the benefit of such covenant, as well as of the other covenants extending to assigns, so far as respects the parts purchased by him; yet, to avoid all question on this point, and leave the risk attending the loss of the means of enforcing such covenants on the person retaining the custody of those means, I think, the purchaser may reasonably require a covenant from the vendor for the production of those title-deeds, to such an extent as the

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covenant

covenant in the vendor's purchase-deeds entitled him to the production thereof, unless he can procure a new covenant for that purpose from his grantors to the new purchaser. If it is right that a vendor, retaining the title-deeds himself, should covenant for their production, can it be otherwise, that a vendor, retaining in his own custody the means of obtaining their production, or a compensation in default thereof, should covenant to produce them to his vendee, in the manner, and on the terms upon which he is so entitled to their production? Where is the difference between the vendor's retaining the possession of the title-deeds himself, and his retaining the right and means of obtaining that possession on any requisite occasion, in respect to his obligation to produce them on any such occasion to his vendee? Or why should he refuse to covenant to produce them in one case more than in the other, unless he distrusts the means he has retained for obtaining the production of them himself? If he does so, that becomes an additional reason for still further caution in, and security to his vendee. It therefore seems to me that the vendor, in this case, retaining his own purchase-deed, which entitles him to the production of the scheduled title-deeds, may reasonably be required to enter into a similar covenant for producing the same deeds to his vendee. But at the same time that

it seems reasonable that the vendee should be put as nearly as possible in the same state of security as if the vendor's purchase-deeds had gone with the title, it is equally fair that the vendor should not subject himself by his covenant farther than seems requisite to answer this end; and therefore, I think, the covenants now in question should be qualified by a proviso and agreement, including a covenant on the part of the vendee, at the end of the vendor's covenants, that in case upon any claim or demand made by the vendee, his heirs or assigns, upon the vendor, his heirs, executors, administrators, or assigns, under or by virtue of the covenant on the part and behalf of the vendor for quiet enjoyment, against the acts of Mr. O. and his wife, and her ancestors, or under or by virtue of the covenant entered into by the vendor for producing the title-deeds comprised in the covenant entered into with him by his said grantors, the said vendor, his heirs, executors, administrators, or assigns, shall produce and deliver to the said vendee, his heirs or assigns, the purchase-deeds from his grantors, in order to enable the vendee, his heirs or assigns, to avail himself of the covenants therein contained on the part of Mr. O. and his wife; and shall, at the costs and charges of the vendee, his heirs or assigns, concur in any deed or act that may be requisite for the enforcing the performance of any of such covenants, or obtaining the pro-

duction of the said title-deeds, or any of them, against the said O. and his wife, and their representatives; or obtaining damages, upon breach of any of the covenants contained in the said purchase-deeds, from the said O. and his wife, by any action, suit, or other proceeding or means that the vendee, his heirs or assigns, may think proper for the purpose, so far as respects the lands purchased by the vendee; and for indemnifying him, his heirs or assigns, in respect of any such breach of those covenants so entered into by the said O.; that then, and in such case, the vendee, his heirs or assigns, shall not commence any sort of action, suit, or other proceeding against the vendor, his heirs, executors, administrators, or assigns, upon, under, or by virtue of the covenant by him entered into with the vendee for quiet enjoyment, as against the acts of Mr. and Mrs. O. or her ancestors, so far as it respects any such acts or deeds only, and not the acts or deeds of the vendor, or those claiming under him, or upon, under, or by virtue of the covenant entered into by the vendor for the production of the title-deeds covenanted to be produced by his grantor; and that the vendor, his heirs, executors, administrators, or assigns, shall not, in any such case, be liable to any loss, costs, charges, damages, or expences, for or in respect of any acts or deeds of Mr. O. or his wife, or her ancestors;

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or for or in respect of the non-production of the title-deeds specified in the covenant from Mr. O. and his wife, or for any breach of the covenants entered into by the vendor in those respects only. A qualification, by an agreement of the above nature, I conceive, will remove every reasonable objection, on the part of the vendor, to the covenants now required on the part of the vendee,

UPON the general qualification of covenants in purchase-deeds.—The practice stated—And what may be required by the vendee on a new description of the parcels, though there be no doubt as to their identity.

It appears to have been a general practice, of long standing, among the first conveyancers, that a vendor who purchased the estate himself, should covenant only against his own acts; because his vendee may have the benefit of the covenants from the person of whom such vendor himself purchased the estate, and nothing remains but his own intermediate acts to be the subject of further covenant; and this I consider to be the general rule, wherever the estate is satisfactorily deduced into the vendor, and the identity of the estate is out of doubt. If, therefore, the vendees are, in the present case, satisfied with the deduction of the title into the last vendor of the lands, and tithes purchased by them, and that Mr. X.'s purchase and conveyance clearly included, and was proper to pass them, it seems to me, that they should conform to

to the general practice in such cases, and be satisfied with the usual covenants from Mr. X., that for and notwithstanding any *act*, &c. *by himself*, he is seised in fee, has a right to convey, and for quiet enjoyment *against himself and all claiming under him*, and for further assurances from himself, and all claiming under him. But if there is any doubt respecting the title of Mr. X. himself, or the identity of the lands and tithes, as part of those purchased of Mr. X., then, I conceive, the case is out of the common rule I have mentioned; and the vendor ought to covenant *generally*, for want of shewing a title, independent of those covenants, on a purchase in which the covenants extend to the lands and tithes offered to sale by him; but, I understand, that although the vendees have no reason to doubt the sufficiency of the title, or the identity of the estates, yet such identity will not appear on the face of the conveyances to them, in which the lands must be severally ascertained by particular descriptions, not noticed in the general conveyance from the last vendor. This circumstance, I think, warrants the vendees in requiring something more than the usual covenants, because it may put them to considerable difficulty in proving the identity of the estates, which will be requisite to their availing themselves of the covenants from the last vendor. I, therefore, think, they are entitled to a covenant that shall just meet this difficulty, and

no more; that is, the vendor should covenant with them respectively, that the estates conveyed to them respectively, are part of the estates purchased by, and conveyed to him by the conveyance from Mr. Y. The parcels, after being particularly described, may be mentioned to be part of the estate so purchased of, and conveyed by Mr. Y., and Mr. X. may covenant they are so. This, so far as a covenant can go, will supply the inconvenience arising from the difference of description, and subject the vendor and his representatives to prove the identity, or make compensation for the defect of such proof, which is all that, I think, the vendees are entitled to; for, admitting the identity of the estates, I conceive, they are entitled to the benefit of the last vendor's covenants, to the extent of their respective purchases. The doubt of the identity, from the variance of description, is the only ground for requiring any more than the usual covenants. It therefore warrants a covenant against this doubt, and that, I conceive, is all it does warrant. As to the circumstance of the title-deeds remaining in the hands of the vendor, that is to be remedied, so far as the thing admits of it, by his covenant for producing them.

THAT

THAT where a power of sale or mortgage is confined to so much as the personal estate falls short in the payment of legacies, the sanction of a decree is requisite in general, for the security of a purchaser or mortgagee.

A, by will, devised his estates at X. to B. B. for life, remainder to his first and other sons in tail, remainder to B. B. in fee, charged, notwithstanding, with payment of several pecuniary legacies, or so much of them as his personal and executory estate should fall short of paying.

I HAVE perused the annexed copy of Mr. A.'s will, and am of opinion, that B. B. cannot make a good title to a mortgagee for any greater estate than his own life. I conceive the money for payment of the legacies ought to be raised by a sale or mortgage of a competent part of the lands charged, under the *decree* of a court of equity ; and that a mortgagee or purchaser would not be safe without such direction. Indeed,

deed, if there had been a trust-term limited to trustees expressly for raising the money by sale or mortgage, I should still have thought the function of a court of equity requisite to the security of a mortgagee or purchaser; for the charge is limited to so much only as the personal estate falls short of paying. A mortgagee or purchaser, therefore, would be bound to see that he advanced *no more*. And this, I think, could not be authentically ascertained against the issue of *B. B.*, but by accounts, to be passed before a master, of the quantum and application of the personal estate, and the deficiency for payment of the legacies. I think the legatees should file a bill against the devisees of the real estate, making the executor and heir at law parties for establishing the will; and that their legacies, or so much thereof as the personal estate shall be found insufficient to answer, may be decreed to be raised by a sale or mortgage of a competent part of the estate, pursuant to the charge imposed by the will*. As to interest, I conceive, the

* The following observations were delivered by the Author in a subsequent Opinion on a similar point:

When the purchaser can be otherwise satisfied of the application of the personal estate, and of a deficiency thereof

the legatees will be entitled to interest for their legacies, from the times they respectively became payable; and, I rather think, that such interest will be at the rate of 5*l. per cent.* so far as the legacies shall come out of the personal estate, and at 4*l. per cent.* so far as they are payable out of the real estate. Vide 3 *Atk.* 402. 1 *Vez.* 171. 277., where this distinction is laid down, though, in

thereof far exceeding the value of the estate sold to him, and actually pays his money to a creditor and mortgagee of the estates charged, and that only in part of the debt due on the mortgage, I cannot say a decree is necessary to his title. And, therefore, in the present case, if the accounts and vouchers verifying in general the facts above stated, respecting the amount and application of the personal estate, and of the real estate already sold, and the amount of the subsisting debts, are produced, and Mr. A. and his two sons will join in a conveyance, containing a recital of the above stated facts, in a general way, and enter into a covenant with the purchaser, that the substance of that recital is true, and to produce the accounts and vouchers themselves to the purchaser, and his heirs, when occasion may require it, for the manifesting his title, I conceive, the purchaser may safely proceed in the completion of the purchase without a decree.

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some cases, higher interest has been allowed, even on legacies charged on real estate. But the Court will ascertain the rate of interest, when it directs the raising and payment of the legacies.

THAT

THAT a devise may take effect, notwithstanding a partial error in the description of the devisees, if they be otherwise ascertainable.

THOUGH there were no persons to answer the *whole* of the description in the executory devise to *A. B.* and *C. N.*, because those persons were not *grandaughters* of the testator, yet, I think, no one can doubt that they were the *persons meant* by the testator. They are properly described by their *respective names*; and the testator could not mean *grandaughters*, when he had *none*, but must have meant those nieces whom he mentions by their names. If the description, upon the whole, leaves no doubt as to the persons intended by the testator, it seems sufficient to entitle them; for, *nihil facit error nominis, cum de corpore constat*. It seems, by the Civil Law, a devise by a wrong description, if the mistake appears so that the testator's intention can be known, will be good; and so a description of a devise, erroneous *in part*, does not avoid the disposition, if such devisee is *otherwise ascertainable*.

ascertainable. A devise by a grandfather to his daughter's son, by the name of *his son*, was held good, per *Newdig. f. 2 Sid. 149.* And so was a devise to William, eldest son of Charles, though such eldest son's name was *not William*, but *Andrew.* Vide *Finch. Rep. 403.* And a devise to the mayor, chamberlain, and governors of the hospital of *Saint Bartholomew*, was good, though that was not their name of incorporation. All these cases, (and some others that might be cited,) seem to depend on the person's being ascertained by *other circumstances*, or parts of the description, when that part of the description which does not apply was *clearly a mistake*, and not intended to denote or annex to the person of the devisee any quality, circumstance, or restriction, as an *intended requisite* to his taking the estate; and then, as it can only be considered as an intended *further description* of the person ascertainable without it, we may fairly deem it surplusage. It would be strange to construe it as subverting or vitiating the very description it was meant to aid, and render more explicit. Now, in the present case, as the word *granddaughters* cannot be considered as intended to describe *persons so related* to the testator, or as an intended quality, circumstance, or restriction of description requisite to entitle the devisees, when the testator had no *granddaughter* at all: and, as the rest of the description, abstracted from that, applies to and ascertains by name, persons

persons who were the testator's nieces, I conceive, that the description of *grandaughters* is clearly a mistake for nieces; and the persons intended are ascertained, independent of it, by his naming the persons who were his nieces. I, therefore, apprehend, that the devise was good to his nieces named therein, with the mistaken addition of *grandaughters* instead of nieces, as it would have been if the word *grandaughters* had been omitted. It is clear the testator could not mean *grandaughters*, when he had none; it seems equally clear, that he intended the two persons he has described by their names.

THAT

THAT a devise to the heir and another, as tenants in common, will not prevent the heir's taking his moiety by descent.

UPON recollecting the case on Mrs. F.'s will, lately laid before me by Mr. W., it now strikes me, that the opinion I delivered upon it is, in one part, not well-founded; and, though I have not the case, nor a copy of it, by me, my memory supplies me with all that is necessary to enable me to make what, I think, the requisite correction.

The devise by Mrs. F. to her two sons, if I remember right, was under a power in her marriage-settlement. Now, regularly, whoever takes under an *execution of a power* contained in any *conveyance or settlement*, takes under such *conveyance or settlement itself*; and, if this rule extended to the present case, both the sons must have taken as under the settlement, and consequently by *purchase*; in which case, their heirs, *ex parte paterna*, would have been clearly entitled

entitled to *the whole*. But the rule, it seems, does not hold in a devise, under such a power, to the *heir at law* of the party executing it, where such *heir* would have taken the *same estate by descent* from *that person* in default of execution of the power. Vide *Hurst v. The Earl of Winchelsea*, 1 *Black. Rep.* 187. For there, according to the common rule in respect to devises to an heir at law, such heir shall be in by descent, and not by purchase.

This consideration only affects the *moiety* of the eldest son; for, as to that devised to the youngest, he could not take it otherwise than by *purchase*, as he was not *heir* of the testatrix; and, as he took by purchase, his share of course descended, either *immediately* from himself, or *mediately* through his brother, (if his brother survived him,) to his heir *ex parte paterna*: And, therefore, I think it clear, that the heir of the son, on the part of *Mr. F. their father*, is entitled to this moiety. But, as to the other moiety devised to the eldest son, it remains to be inquired, How the lands were limited by the settlement, in default of appointment by *Mrs. F.*? which, I believe, did not appear by the case stated. If they were not limited to her *in fee*, so that her eldest son would not have taken if there had been no will, then, I conceive, he took as under the settlement, by virtue of the execution of the power contained therein; for

he could not, in that case, take by descent; and then, as he took by *purchase*, his moiety also descended to his heir *ex parte paterna*; and then the title to the *whole* will stand as supposed in my former opinion. But if the lands were, by *the settlement*, limited to Mrs. F. *in fee*, in default of appointment, so that her eldest son *would have taken as heir*, if she had not executed her power, then, I conceive, under the authority of the case above cited, he took by *descent*, and not by the will; unless a devise to an *heir at law*, and another as *tenants in common*, prevents the *descent* as to the moiety devised to such heir, and makes him take by purchase under the will.

Now, I believe, in my former opinion, I supposed this circumstance of the *tenancy in common* to be an obstacle to his taking by *descent*, and that, to do so, he must have *taken solely as his mother held it*. But this latter proposition is certainly wrong; for, suppose a testator devises a moiety, or any other undivided share of his real estate to a stranger, making no disposition at all of the remaining undivided share, such remaining share will of course descend to his heir at law, and he must hold it *in common* with the devisee of the undivided share devised. It is clear, therefore, that an heir may take by *descent*, as *tenant in common* with a devisee, an undivided part of the estate, which his ancestor *was solely seized of*; and it appears to me to be immaterial, whether the

the share he so takes is *expressly devised to him*, or left unnoticed by the *will*; for, if expressly devised, he takes it in *common*, and, if not noticed, he takes it in *the same manner*; and a devise to two or more as *tenants in common*, is in effect a devise of one undivided part to one, and of another undivided part to the other; so that under such a devise to an heir and another as *tenants in common*, the heir takes as if one undivided moiety were devised to the other, and the residue to himself; that is, in the same manner as if no disposition at all of such residue had been expressed in the will; in which case he would have taken by descent; and therefore, the same estate being devised to him in such residue as he would have taken by descent, I think, the general rule, respecting devises to an heir, extends to it.

It has indeed been held, that a devise to the *heir and another*, makes the heir a purchaser; but that seems to be on account of the *joint tenancy* and benefit of *survivorship* to the stranger. And it appears, that under a devise to *two co-heirs*, they take as joint-tenants by the will, and not by *descent*; and so in a devise to them *in common*, they take as *tenants in common*, and not by *descent*. But, it is evident, under either of these tenures, they take *every part* of the land devised in a different manner than by *descent*; whereas, in the case of a devise to the heir and

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another,

another, as *tenants in common*, the heir seems to take the *part devised to him*, just in the same manner as if it had been left *to descend* to him. I therefore, upon this consideration of the point, am of opinion, that the devise being to the two sons, as *tenants in common*, was no obstacle to the eldest taking his *moiety* by *descent*; and consequently, that if the lands were settled on his mother *in fee*, so as to descend from her to him, in default of appointment, he took his moiety by *descent*, and not by the will or settlement; and, in that case, his heir *ex parte materna* will be entitled to his said moiety.

THAT

THAT a fee-simple will pass under the following devise, though there be no words of limitation of the inheritance.

A., by will, says, " I give to my nephew B.,
" son of C., all my messuage or tenement
" in D., to him and his heirs for ever ;
" but if the said B. should happen to die
" without heirs, then my will is, that the
" messuage shall return to my legatees then
" living, to be divided by equal shares
" amongst them."

THE first limitation to B., and his heirs for ever, would clearly have given him the *fee-simple*, had the devise rested there ; but the subsequent limitation over, on his dying *without heirs*, being to persons who must fall within the *line of collateral heirs*, and while any of them existed, the devisee B. could not die *without heirs*, I conceive manifest, that by *heirs*, in the first devise, the testator

meant *lineal heirs*; that is, heirs of the body of *B.*, and consequently reduced the first limitation to an *estate tail*, as in the cases of *Tyte v. Willis*, *Cas. temp. Talb.* 1. *Morgan & Uxor v. Griffiths*, *Cowp. Rep.* 234. I therefore am of opinion, that the will, as above stated, operated as a devise to *B. in tail*, with remainder to the legatees, (that is, the testator's grandchildren, who were such legatees,) living at *B.*'s decease, equally amongst them: But, there being no words of limitation of the *inheritance to such devisees*, the doubt arises, whether they took *the fee*, or only *estates for their lives*.

In general, a devise, without words of limitation, gives *only an estate for life*; and the current of authorities for this point is so strong, (vide 1 *Vern.* 65. 1 *Vez.* 227. *Right v. Sidebotham*, *Dougl. Rep.* 730., and the cases there cited,) that I should have inclined to that opinion here, and that the reversion expectant thereon descended to the heir at law of the testator, but for the case of *Oates v. Brydon*, 3 *Burr.* 1895., where, upon a devise of an house and stable, after two lives, to *the children of the testatrix's cousins T. and S., or such of them as should be then living, share and share alike, to be divided amongst them*, it was held, that they took the *fee*, and that the direction, that the house and stable should be *divided amongst the children*, imported, that they *must be sold*, and the *produce divided*;

divided; which authority seems to apply to the present case.

It is true, there were two *preceding express estates for life*, in that case, which afforded an inference, that where there was no express *limitation*, a greater estate was intended; and here the direction, that the estate should *return*, that is, *revert*, may possibly, to effectuate the apparent intent, be construed as tantamount to a devise *of the reversion*, which, I conceive, would have carried the whole fee. For this reason, and upon the authority of the case I have cited, I rather choose to incline to the opinion, that the said grandchildren living at the death of *B.* may be construed to be entitled to *the fee* equally, as tenants in common.

THAT a fee-simple will pass by construction under the following will :

A. B., by will, says, " And for my estate, which
" God hath endowed me with, I give and
" dispose thereof in manner following :
" I give, devise, and bequeath my house
" and premises at *C.* unto my sister *D.*,
" for and during the term of her natural
" life only ; and from and after her de-
" cease, I give, devise, and bequeath the
" same, and every part thereof, unto *M. E.* ;
" but in case the said *M. E.* should die
" before my said sister, then I give, devise,
" and bequeath the same, and every part
" thereof, unto his eldest daughter *F.*, and
" her heirs and assigns for ever." And,
after giving several pecuniary legacies, she
says, " The residue and remainder of my
" estate, real and personal, of what nature
" or kind soever, I give, devise, and be-
" queath to my said sister *D.*"

Mrs. D., who was heir at law of the testatrix,
died, leaving *Mr. E.* living.

THE effect of the devise in question, for want of words limiting the inheritance, must depend entirely on construction, founded on the apparent intent of the testatrix, to be collected from other expressions or dispositions in the will, to pass the fee to the devisee; and consequently the case will not admit of any decisive answer. But, I incline to the opinion, that Mr. E. took the fee under the devise in question; for which opinion there appears to me to be four concurrent grounds, on the face of the will itself: 1st, The introductory clause, expressing a disposition of all the estate which the testatrix was endowed with, and therefore leading to such a construction of the following particular devises as should answer that intent. 2dly, The limitation to the devisee *for life*, who was heir at law, being expressly to her *for life* ONLY, which amounted to a negative on her taking more, and shews, at the same time, that the testatrix knew how to limit an estate for life, and expressly confined the devise to such limits, where she intended no more. 3dly, The devise over to Mr. E.'s daughter *in fee*, in the event of *his* dying in the lifetime of the sister,

sister, which is an express disposition of the *whole fee*, after the decease of the testatrix's sister, if Mr. *E.* died in such sister's lifetime; and being, at the same time, an alternative or substitutionary devise, for and in the place of that which preceded, may be considered as the rule for ascertaining the constructive limits of that in place of which it was to take effect. Besides, that if the testatrix be considered as not intending more than an estate for life to Mr. *E.*, it would have been *immaterial* whether he died in the lifetime of her sister or not. 4thly, The *residue* of the *real* and *personal* estate is given to the sister, the first *devisee for life*, which, if Mr. *E.* were not to have taken the fee, in the event of his surviving the testatrix's sister, would have been inconsistent with the first devise to her *for life ONLY*; because, under such a construction, the remainder or reversion being undisposed of, in that event, would have fallen into the said residuary devise, and have given her the *inheritance*. Upon the grounds I have noticed, it seems clear to me, that the testatrix intended to dispose of her *whole estate*; that her sister (heir at law and residuary devisee) should have no more than an *estate for life* in it; that Mr. *E.* should have it after her decease; but if he should not live till it fell into possession, then his daughter should have it *in fee*. Now, as it is not given to his daughter at all, but in the event of Mr. *E.*'s not living to enjoy it,
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we cannot reasonably suppose a less estate was intended for him than for his daughter, who was a mere substitute in his room, nor make such a construction of the devise to him, as would not only leave an *intestacy* in a very probable event, *viz.* That which has happened, contrary to the express intent of a *total disposition*, but give the testatrix's sister the fee in that event, contrary to the express restriction of her *taking for life only*. The devise seems in effect to be a disposition, after the decease of the sister, to Mr. *E* ; and if he should not be living, then to his daughter *in fee*. Here the express measure of the latter seems a fair rule for the constructive extent of the former limitation. It therefore appears to me, that Mr. *E*. took the estate in fee, in the event that has happened, and may make a title accordingly. But I cannot say that such title will be clear of dispute, as scarce any title depending on *construction* can be said to be, though, I think, any attempt to impeach it would be unsuccessful. The concurrence of the heir at law of the testatrix's sister, in the surrender, would prevent all question about it; and considering the strength of the case on Mr. *E*.'s side, I should think it might be obtained on very inconsiderable terms.

THAT

THAT a devise to a person, "and to
"and for her sole use and benefit,"
gives a fee-simple.

THIS, like most other cases depending on *mere construction*, seems to admit of different opinions. The general rule is, that an indefinite limitation, even in a will, gives only an estate *for life*, without other expressions, or concomitant circumstances expressing or clearly denoting the intent to give a greater interest. And therefore, had the case rested merely upon the words, *unto my dear wife A. B.*, then, as the description of the estate is, by particular words, applicable merely to the *subject*, and not to the testator's *interest or estate therein*, I should have been of opinion, that the devise in the codicil would have given his wife no more than an estate for life; as in the case of *Right v. Sidebotham*, *Doug. Rep.* 759., and other cases there cited. But the additional words, *and for her sole use and benefit*, raise the question; and rather seem to alter the case in her favour; because those words, I think, may
be

be taken to import a disposition of the *whole benefit* of the lands *to her*; the word *sole* confining the benefit thereof to *her alone*, and, consequently, excluding every body else from any share in the benefit of those lands.

It may be objected indeed, that a devise to one implies for *his use and benefit*, where no other use is expressed thereof; and, consequently, that the latter words do not give any greater estate than is contained in the former. And so far is true, that a devise to one is of course for *his use and benefit*, where no other end or trust is expressed; but then no *use or benefit can be so implied* to such devisee, any further than to the extent of the *estate passing by the words of the devise*, and, consequently, only for life, where the words themselves do not express or import any greater estate. But here, the *devised benefit* is not a *use or benefit implied in or passing merely by the limitation of the lands*, but is expressly limited by a *separate declaration of such intended benefit, and of the intent of the devise for that purpose*, and in such terms as seem to amount to an *express gift of the lands for the only benefit of the widow*. The devise, for her *sole benefit*, implies such an intent in that devise of the lands, to correspond with and answer this *express exclusive benefit* so declared for her.

A devise

A devise of lands, for the *sole benefit* of a person, seems rather to import a gift of the *benefit of those lands to him only*; that is, of the *whole beneficial interest therein to him*. And though a devise to one, is a devise to him for his use and benefit, *quoad the extent of the estate devised*, yet it does not confine the benefit of the lands to that person, nor *exclude any one else* from the benefit of the lands, after the estate imported in the express devise. But a devise to one, *and for his sole use and benefit*, seems equivalent to a devise to one, to the intent, or so as to exclude *every body else from any benefit of the lands*.

In the present case, the testator gives the lands to his wife, *and* he then gives them for her *sole use and benefit*; that is, to the use and benefit of her, *exclusive of any one else*, so as nobody else should have *any benefit therein*; for if they could, the devise would not give her the *sole benefit* of the lands; so that the claim of the heir seems contrary to the express purport of those words; for if he is entitled to the lands *after her decease*, the devise has not operated to give the lands *for her benefit, exclusive of any body else*. Upon the whole, therefore, though I think it a very questionable case, I rather incline to think the words, "*and for her sole use and benefit*," as expressing an intended exclusion of every body else from any benefit of the lands, may be held to pass the fee

fee to her; otherwise we deny any effect at all to the words, *for her sole benefit*, however apparently expressive of the testator's intent to give her the whole benefit of the lands. In a devise of lands to a person, the *benefit*, of course, is *implied* to the *extent of the devise expressed*. In a devise to one for *his sole benefit*, the devise, I incline to think, may, by implication, be held commensurate with the declared end of the devise; that is, with the *exclusive benefit of the lands* so expressly declared *for him only*. It seems equivalent to a devise or declaration of the testator's intent, that such devisee should have the whole benefit of the lands so devised.

THAT

THAT a devise of lands "to *A. B.*,
 "his executors, administrators, and
 "assigns," will give the fee-simple.

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THE words, "*hereditaments whatsoever, which I shall die seised of,*" in the devise in question, apply properly enough to the reversion of which the testator was seised in the settled lands, and I conceive extended to it; vide *Strode v. Russell*, 2 *Vern.* 621. *Chester v. Chester*, 3 *P. Wms.* 56., amongst other authorities. And, I think, they equally extended to the remainder in fee, after the estate devised to the wife in the fields; vide *Lydcott v. Willows*, *Carth.* 50. *Kingsman and Kingsman*, 2 *Vern.* 559., among other authorities. And as to the quantity of estate which *A. B.* the younger took in the land, to which, I conceive, the residuary devise so extended, I am to observe, that, although the express devise to, and provision for the heir, would not, of itself, have excluded him from what else was not disposed of from him, yet it may

serve to aid the construction of irregular words in other dispositions, indicating an intention to exclude the heir, and give a transmissible interest to the devisee. Of this sort, I think, are the words of limitation, *executors, administrators, and assigns*, annexed to the devise to *A. B. the younger*, in the residuary devise of all the testator's messuages, lands, tenements, and hereditaments which he should die seised of, &c. These words certainly import the intent of an estate that should continue after the life of the devisee, and go to his *representatives*, and are only erroneous in the description or denomination of such representatives. They express *representatives*, but mistake the class. I think it cannot be denied, that they at least imply the intention of such an estate as should be *transmissible* from the devisee to his representatives; and this intention admitted, it remains for the law to correct and ascertain the proper class of representatives, and construe such transmissible estate as a devise to one and his heirs, which, I conceive, would have been the effect of a devise to one and his representatives; to which a devise of real estate to one and his executors, administrators, and assigns, seems tantamount, under that latitude of correction which the rules for the construction of testamentary dispositions allow to the untechnical or mistaken expressions of a testator, to effectuate his substantial apparent intention. And, accordingly, in the case of

Rose and Hill, 3 Burr. 1881., the words executors and administrators, in the limitation of real estate, were held plainly to shew, that the testator meant the estate to go to representatives, though he had used improper terms; and, upon this principle, it was said, *executors* were equivalent to *heirs*, in a will; vide *3 Burr. 1885.* I am, therefore, of opinion, that *A. B.* the younger took an estate in fee, in all the testator's residuary real estate, which appears to me to have passed by the residuary devise in question.

THAT

THAT the words, "*testamentary estate*," coupled with other circumstances, may pass the fee-simple:

A., by will, after expressing an intention to dispose of all his wordly estate, and giving a shilling to his heir at law, and directing the payment of his debts, legacies, and funeral expences, says: "And as to, for, and
" concerning all the rest, residue, and remainder of my goods, chattels, book-
" debts, securities for monies, personal and
" *testamentary estate* whatever and where-
" soever, and of what nature, kind, or
" quality soever, not hereinbefore by me
" given and disposed of, I give, devise,
" and bequeath the same, and all and every
" part thereof, unto my son B., his heirs
" and assigns for ever*."

* *Vide* a similar case, *Smith v. Coffin*, *H. Black. Rep.* vol. 2. p. 444.

THIS appears to me a disputable case. The words, *testamentary estate*, seem most properly applicable to *personal property*, the original subject of what is *properly called a testament*, to which an *executor* is essential in the strict sense of the word in the civil law, and its following the words enumerating several species of *personal estate*, and being coupled with the word *personal*, may be urged as an argument in favour of such a construction, inasmuch that had the construction rested merely on those words, I should have inclined rather to think, that they did not extend to real estates. But a testator is not tied up to strictness of expression, or propriety of words; and the words *testamentary estate*, though most properly applicable to *personals*, are not, I conceive, confined to that sense, but may mean whatever estate is subject to, or can be disposed of by, his testament. Now, the statute of wills expressly subjects lands to disposition by last will or *testament*, and, therefore, in the *large sense* of the words, *testamentary estate*, they seem *applicable to lands*. And here the introductory words, expressing a
disposition

disposition of all the *testator's wordly estate*, and his giving a shilling expressly to the *person who was his heir at law*, and limiting his residuary property, subject to the payment of *his debts, legacies, and funeral expences*, by words adapted to lands, and to a *limitation of the inheritance*, I think, manifest the testator's intention to give him all *his residuary property*, and, consequently, that he meant, by the words, *testamentary estate*, to include *his lands*, and every thing else that was subject to *testamentary disposition*. The extensive additional words, *whatsoever and wheresoever, and of what nature, kind, or quality soever*, corroborate this construction; and, in any other sense, the coupling the word *testamentary* with personal, would be nugatory. It is true, that in an indefinite devise of lands to one without words of limitation, such introductory clause, and disinheritance legacy to the heir, as in the present case, have been held insufficient to entitle the devisee to the inheritance. Vide *Right v. Sidebotham*, *Doug. Rep.* 759., and the cases there cited. But that was for want of *words sufficient to carry it*. But here, if the words, *testamentary estate*, are applied to *real estates*, they are sufficient to carry the lands in question, and there are proper words of limitation extending to the inheritance, in support of such a construction; and though, as the *personal estate* is expressly included in the *same words of limitation*,

the argument of intent, from those words, merits very little stress; yet, I think, the other circumstances I have noticed, sufficiently indicate the *testator's* meaning to pass *every estate*, of *what-ever quality*, that was subject to his power of *testamentary disposition*; and, therefore, I rather incline to the opinion, that the lands in question passed to the son *B.* in fee, by the above stated will.

THAT

THAT the word *legacies*, from the apparent intention of the testator, is applicable to real estates, and passes the *fee* *.

THE only difficulty in the present case arises from the testator's use of the word *legacies*, in the dispositions to his wife now in question; because that word does not technically, or in legal propriety, apply to devises of real estate. But, I apprehend, that it cannot, at this day, be seriously contended, that a testator is tied down to the use of technical or legal propriety of expression; but that it is in general sufficient, that the intended application of the words is manifest, although such his application may deviate from legal strictness; and, consequently, that if, in the present case, it plainly appears, that the testator referred or applied the word *legacies* to the preceding devises of the freehold

* *Vide* the case of *Hardacre v. Nash*, 5 Term Rep. 716.

and copyhold estates given to his children, the ulterior devise to his wife will extend to them. Now, the word *legacies* could not well refer to the gifts of — *l.* to each of his two children, because these were expressly given to those children when of age, and might have been received and spent by them long before. But the freehold and copyhold estates being first given to the wife in the *general devise* to her for her life, and, after her decease, then to the children respectively, appear to be the natural subjects of an alternative disposition, directed to take effect in the event of their deaths, before the decease of the wife, that being an event which was the alternative of the surviving her, when the estates devised to the children were to take effect in possession; and, consequently, the dispositions directed upon it, seems to be a substitutionary disposition to that intended for the children in such alternative event. After the decease of the wife, the children were to take; but if they were not then living to take, the legacies (so styled) were *to return to her*. The very word *return* expresses the restoration of what was before given her by the preceding general devise, and what was only to be taken out of it at her death, if the children were then living to take it. This was the situation of the freehold and copyhold estates in question. Such, therefore, evidently appears to me to have been the application of the word *legacies* intended by the

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testator;

testator ; and the explanation of that word must, I conceive, be governed by such apparent intention of the testator, as was held in the case of *Hope v. Taylor*, 1 Burr. 268. There is, in that case, an introductory clause, expressing a complete disposition of all the testator's worldly estate ; and here also is no more than an estate for life, devised to *A.* in the lands in question ; and the words in the ulterior devise to the widow, *for her to dispose of freely as she may think fit*, are most properly applicable to permanent subjects, as lands, and in giving the absolute disposition thereof, clearly import the superinduction of the fee to her, in the event mentioned, in addition to the estates for life, to which she was restrained in the alternative of that event. Upon the whole, without entering further into the particular circumstances of the present case, I cannot, upon the authority I have cited, help considering the widow as becoming entitled, in the event that has happened, of her surviving *A.* to the freehold and copyhold estates intended for him, if he had survived her, according to the fair construction of the will above stated.

THAT

THAT the trustees take a fee, from the nature of the trusts, though there be no words limiting the inheritance; that the first cestuique trust takes for life, with remainder in contingency, with double aspect; and that, upon the failure of contingent limitations of the absolute property in leaseholds, and residuary personal estate to persons attaining twenty-one years, after a life in being, substitutionary limitations over are good, where the words, "*dying without issue*," mean dying without issue living at the decease of the tenant for life.

THE property which is the subject of the present inquiry is distinguishable into three kinds, namely, lands of *inheritance*, (in which I include the *copyhold*); *leasehold lands*; and the monies to arise from the residuary personal estate. The lands of *inheritance* are devised to two trustees, and the survivor of them, upon

certain trusts; which trusts, as they extend to the inheritance, and cannot be performed without considering the inheritance as vested in the trustees, I conceive, that the inheritance passed to the trustees, notwithstanding the *omission of words of limitation to their heirs*, or to the heirs of the survivor, if there be nothing in the will to prohibit such a construction. Now there is nothing of this tendency, that I discover, in the will, unless the direction for the supplying the place of a deceased trustee, from time to time, by a nomination of, and assignment of the estates to, a new one, in conjunction with the surviving trustee, to the end that the trust may not go or descend to an executor or administrator, can be considered as importing something of this kind. But, to me, it does not appear to have any such import; for this very direction supposes, *may requires*, that the *legal* estate should always be vested in the surviving trustee for the time being, and by him be assigned, so as to become vested in himself and the new trustee, which would be impossible, if the first devise to the trustees be taken to pass no more than an estate for their lives, and the life of the survivor; in which case, after the decease of one, the other could assign to a new trustee no more than an estate for his (the old trustee's) own life; and, upon *his* decease, the estate would determine, and the trustee surviving him would be incapable of fulfilling the direction of the will, by having

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no estate remaining in him to assign to any new trustee; and so far from the trusts not descending or going to an executor, it would, after the death of the survivor of the two trustees named in the will, descend or go to the *heir* at law, and the executors or administrators of the testator himself. I see no other intention expressed in this clause, than what is imported in every clause, which directs a substitution of new trustees in the room of those deceased; the intention of which clearly is to keep the *trust* always in the hands of proper persons, to be approved of by the parties interested, and prevent its devolving on heirs, executors, or administrators. This end is *implied* in every proviso or direction for keeping up the number of trustees, and no more is expressed in the present clause; for it does not say, to the end that the *estates*, or the *legal estate*, in the premises, may not go or descend, but that the same *trust* may not go or descend, &c. The end is, to prevent the trust from coming to an executor or administrator. The means prescribed for the attainment of this end are, that the surviving trustee, from time to time, as often as the present or any *succeeding* trustees shall be reduced by death to one, shall assign, or cause to be assigned, the estates, and all his *estate, term, and interest* therein, &c. to one or more new trustee or trustees, &c. in such manner as that the *legal interest thereof* may be *vested* in such survivor, and the person or persons who shall

shall be so nominated, &c. Now, if the first trustees did not take the whole legal estate and interest, any succeeding trustee, surviving them, would, after their decease, have no *legal estate or interest in him*, to assign, or cause to be assigned, &c. in such manner as that such *legal interest* might be *revested* in such survivor, &c. Therefore, as the express end of this clause is not inconsistent with the trustees taking the whole legal estate, and the means prescribed by the same clause, for effecting that end, require, that the whole *legal estate* should pass to the trustees, I am so far from considering it as tending, in any degree, to prevent the construction of their taking the whole legal estate, that I cannot help thinking it an additional ground for such construction.

Under this view of the case, the whole legal estate is in the trustees, and the several other limitations give mere trust or equitable interests to the respective objects of them. The first trust of the freehold, copyhold, and leasehold lands, is to permit and suffer the testator's daughter *A. B.* to take the rents and profits for her own use and benefit, for her life; and after her decease, the trust is to permit the issue of her body, both male and female, and their heirs, to take the rents and profits for their use and benefit, in *equal shares, as tenants in common*. Now this clearly is in the nature of a contingent remainder
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to such issue, and cannot operate as words of limitation creating an estate tail in the ancestor *A. B.*; for though she took a preceding estate for her life, yet is not this within the rule laid down in *Shelly's* case; because, in the first place, this does not arise upon the limitation of a legal, but of a mere *trust* estate: 2dly, The limitation is not by the word *beirs* of her body, but *issue* of her body; which word *issue* is not so settled a word of limitation, as the word *beirs* of the body, but is construed in a will, either as a word of limitation or of purchase, as appears most consistent with the intent of the testator. Besides, here are words of limitation, *their beirs*, super-added to the word *issue*; and what, if there were nothing more in the case, would put it entirely out of all question, is the limitation being to the issue, *both male and female, in equal shares, as tenants in common*, which is totally incompatible with an *estate tail* in the ancestor, which would descend wholly to an *elder son*, instead of going to sons and daughters *equally*.

I therefore am of opinion, that *A. B.* has no pretensions to an estate tail, but that she took only an estate for life in the freehold and copyhold estates; and, I conceive, that the limitations over, after her decease, operated as a remainder in contingency, with double aspect; namely, if she should have any issue, then to such issue, as tenants in common, in fee, subject

ject to the proviso for survivorship, in respect to the shares of any dying under twenty-one; and if she should have no issue, then over, according to the other subsequent limitations.

Possibly it may be urged, that the devise over, in the event of *A. B.* happening to *die without issue of her body*, reduced the estates limited to such issue and their heirs, to estates tail. If it did, then the next subsequent remainders to the persons *in esse* may be considered as *vested*, instead of *contingent*. I rather incline to the other opinion; but as that appears to me to be a point quite immaterial to the present inquiry, I think it needless to enter into it. What makes me consider the question, whether any of the remainders over are *contingent* or *vested*, immaterial, is, that the *legal estate's* being in the trustees, will support such remainders, though *contingent*, and put it out of *A. B.*'s power to prejudice or bar them, as she has no estate tail, but merely an equitable estate for life in the lands. And this would be the consequence, during the life of the surviving trustee, even if the inheritance had not passed to the trustees by the will; and, after *his* decease, the heir of the testator, I conceive, would stand in the place of a trustee for the several devisees in the will, according to the estates or interests thereby devised to them respectively, and, consequently, would not have it in her power to prejudice or bar their
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their interests, but would be as much bound to carry the trusts into execution, as if both the trustees had died in the testator's lifetime. It follows, that I am of opinion, that *A. B.* is only entitled to an estate for her life in the freehold and copyhold lands, and cannot, by recovery, or any other act or means, bar the limitations over, or acquire herself the inheritance, or the absolute dominion of those estates.

I come next to consider the effect of the devise in regard to the leaseholds. These are included in the same limitations with the freeholds, so as to entitle *A. B.* thereto during her life; and, after her decease, to carry the whole beneficial interest in the same, absolutely, to her issue, as tenants in common, subject to the proviso for survivorship, in respect to the shares of any of them dying under twenty-one. So far the trusts of the leaseholds are good and clear of all question, in regard to validity; for executory limitations of leasehold estates are allowable within the limits of a life in being, and twenty-one years after. And here, considering issue as meaning children, (as the testator himself explains it, when, in the clause of survivorship, he says, "*but in case any or either of the said children of my said daughter,*" &c. having only used the word *issue* before), the time for the absolute vesting of the leaseholds is confined to twenty-one years after the decease of *A. B.*; so
that

that this limitation to her children being good, would, of itself, prevent her from enlarging her estate or interest in the leaseholds, or acquiring the absolute interest therein. But if the probability of her having any issue be very remote, the intervention of the contingent limitations to them may not be the object of much attention, which will make it more material to consider the nature of the further limitation over, in default of her issue.

The devise over is limited to take effect, in case *A. B.* "shall happen to die without issue of her body lawfully to be begotten." Now a limitation over of any chattel or personal property, upon the event of failure of issue is, in a general unrestrained sense of the words, too remote, and therefore void. But if such limitation is, either by restrictive words, or by any expressions, or other dispositions in the will, expressly, or by clear and obvious implication or inference, restrained to the dying without issue *living at the decease of the person in being*, whose issue is spoken of, or to the dying without issue *which shall live to attain the age of twenty-one years*, it falls within the limits allowed to executory devises, and is, accordingly, valid. Now, in the present case, the whole interest in the leaseholds having been given, absolutely, to the issue of *A. B.*, after her decease, under the limitation to them

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and their *heirs* (which word *heirs*, in a will, signifies *representatives*, according to the nature of the estate), subject only to the proviso of survivorship, as to the shares of any dying under twenty-one, it seems to follow, that the limitation over, in *default of issue*, must be understood as restrained to the failure of issue (that is, *children*, according to the testator's own explanation above noticed,) attaining the age of twenty-one. This reduces the limitation over to the allowed limits; and brings it within the description of an executory devise, to take effect within the period of a life (*A. B.*) in being, and twenty-one years after it. This differs from the cases, where the preceding limitation is to a man and his issue; and, in default of *such issue*, remainder over; or where there is no preceding limitation at all to the issue, but the estate is originally given on the failure of issue of some person, to whose issue it was not previously devised; for there the expiration of the preceding estate, and the contingency of the event on which the estate is given, being too remote, the limitation over is void in its creation. But this is a case where the *whole interest* being previously disposed of, (namely, to the issue of *A. B.*) upon a contingency not too remote in its nature, the subsequent limitation is not in the nature of a remainder, to take effect *after it*, but is merely a substitute for, or alternative to, such preceding limitation, and only intended

intended to take effect in case that fails, and, consequently, is eventually good equally with such preceding disposition, as it must either fail upon the vesting, or vest upon the failure of the first, at the time limited for the first to take effect. This is, in effect, a limitation over to a person in default of the vesting of an estate limited to a person who never comes *in esse*, and in such event is good, as in the case of *Green v. Ekins*, 3 *P. Wms.* 306., where, upon the bequest of personal estate to the first son of the testator's daughter who should attain twenty-one; and in case she should have no son who should attain that age, then over; the limitation over was held good in that event. So here the limitation appears to depend, at the utmost, on *A. B.*'s having no child which shall attain twenty-one; and therefore, I think, it will be good in that event. Vide *Massenburgh v. Ash*, 1 *Vern.* 304. *Higgins v. Dowler*, 1 *P. Wms.* 98. *Stanley v. Leigh*, 2 *P. Wms.* 686. *Williams v. Jekyl*, 2 *Vez.* 681. Lord *Hardwicke*'s opinion on the case of *Sheffield v. Lord Orrery*, 3 *Atk.* 287., and *Keily v. Fowler*, before the House of Lords in 1768. I therefore conceive, that *A. B.* is, under the devise in question, entitled to no more than an interest for her life in the leaseholds, and that she cannot, by any act or means, acquire the absolute property therein, or bar the rights of her issue, or of those to whom the same

estates are limited over in default of such issue ; and though it be admitted, that, as executrix, she might make a title to a *bonâ fide* purchaser, for full and valuable consideration, of such leaseholds, yet she would acquire no greater right to, or property in, the said leaseholds, or the produce thereof, by such a step, as she would be accountable to her children, should she have any, or, in default thereof, to the devisees over, for the money arising from the sale of such leasehold lands, in lieu of, or according to the several interests they would have been entitled to in the leasehold estates themselves, if unfold.

It now remains only to notice the disposition of the produce of the residuary personal estate. In this, no estate or interest at all is given to *A. B.* The whole is directed to accumulate till her eldest child attains twenty-one years of age ; and the disposition thereof to her children is such, that if she has any child that shall live to attain that age, such children will become entitled to the whole thereof, absolutely ; so that the limitation over, upon her dying without issue, seems to be, by an obvious inference, confined in this, as in the case of the leaseholds, to the event of her dying without having any child which shall live to attain twenty-one years of age, and is thereby brought within the limits

allowed for executory limitations of personal estate. This renders all that I have said and referred to, in regard to the dispositions over of the leaseholds, on default of issue of *A. B.*, equally applicable to this bequest of the produce of the residuary personal estate. In addition to which, there is another circumstance in the will, relative to the latter, which might of itself be sufficient to restrain the construction of the limitation over, to the failure of issue living at the decease of *A. B.* The circumstance I allude to is, that after the testator has directed one-fourth part of such produce to be paid to his brother and two sisters, each, in case of his daughter *A. B.*'s dying without issue, he goes on and directs, that in case his daughter shall happen to die without issue, and his said brother, or either of his two sisters, shall *not be living at the time of her death*, then, that the respective shares of him, her, or them so dying, of and in the said stock, &c. shall be paid as therein directed; from which it might be inferred, that the testator spoke of, and considered the time of his daughter's *dying without issue*, and the time of *her death*, as one and the same time or period; and, consequently, meant, by her *dying without issue*, dying *without issue living at the time of her decease*.

Our courts are very much disposed to avail themselves of any expression or circumstance in a will, which may afford ground for such a constructive restriction of a limitation over, after a dying without issue, as is requisite to give effect to the devise over, on failure of the preceding. The case of *Keily and Fowler*, above cited, is an authority which, I think, more than comes up to the present case, in regard to this point.

Upon the whole, therefore, I am of opinion, that *A. B.* is entitled to no more than an estate for her life in the freehold, copyhold, and leasehold lands; and that she cannot, by any act or means, with or without the concurrence of her husband, enlarge her estate or interest therein; and that she has no interest at all in the fund arising from the residuary personal estate, nor can, by any means, with or without her husband, bar the contingent right of her issue, or of those persons to whom it is given over, in default of such issue, so as to acquire any right thereto herself,

N. B. The stock arising from the residuary personal estate must, I conceive, await the decease of *A. B.*, if she has no child that attains

attains the age of twenty-one years, in her lifetime, before any body can be entitled to it; and then, upon her death, without any issue living to come of age, I conceive, for the reasons above noticed, it will go to the persons to whom it is given in that event.

UPON circumstances that make it questionable, whether trustees, who are also made executors, take only a chattel interest, or the fee; and upon the effect which the latter construction will have upon limitations, which, supposing they took only a chattel interest, would, it is conceived, give an estate tail in the lands devised.

THOUGH there are circumstances attending the above stated devise, that introduce a doubt respecting its operation, yet, upon the whole, I am of opinion, that *A.*, the testator's son, took an *estate tail* in the freehold estates thereby devised to him, and, consequently, may, by a recovery, bar that estate tail, and the remainders over, and acquire the fee, subject to the subsisting trust respecting the two closes for payment of the mortgage debt directed to be discharged
out

out of the rents of those two closes. I think it a questionable point, how the devise to the trustees, *as to those closes*, operated; that is, whether they are to be considered as taking only a *chattel interest* therein, the limitation being to them, and the survivor, and the *executors and administrators* of such survivor; and it being, in effect, *as to those closes*, a devise to persons who were *executors*, for *payment of a certain debt*, or till that debt was paid; for a devise of lands to *executors*, as such, for payment of debts, it seems, gives them a chattel interest; vide *Co. Litt.* 42. a. (And, according to Lord Hale's MSS., inserted by Mr. Hargrave on his note on *Co. Litt.*, in the same page, a limitation of *land* to one, till *a certain sum was levied out of the profits*, was ruled to be a chattel.) Or whether, as it is confined to one certain debt, and in the shape of a particular trust respecting that, and a trust that might exceed the compass of lives, it may not be considered as giving them the inheritance to answer the end of the trust. The subsequent direction to the trustees, *to pay* the rents and profits to the son, for life, after discharge of the mortgage debt, implies an intended *continuance* of the estate, in the trustees, beyond that period, and therefore it seems to countenance the latter construction. If only a chattel interest passed to the trustees, in those closes, the *legal* estate, I conceive, in remainder, passed in the subsequent limitation to the son;
for

for his

life, and after to his heirs lawfully begotten; and then, I conceive, the latter limitation to his heirs, uniting with the preceding estate to him for life, (for a devise of the rents and profits is equivalent to a devise of the lands), gave him an estate tail in those closes. And as to the residue of the lands not comprised in the trust, as I see nothing to invest the trustees with the *legal freehold or inheritance in them*, I conceive, the legal estate passed in the devise of the rents and profits to the son, for his life, and afterwards in that to his heirs, &c. For though the direction to the *trustees*, to permit him to inhabit the dwelling-house, seems to imply the testator's idea of the estate being in *them*, yet as there was no limitation to give them the freehold or inheritance, I conceive, it passed in the subsequent limitations; and therefore, I see no sufficient reason to hesitate in the opinion, that by such union of the two limitations, the son took an estate *tail* in the lands not comprised in the trust, for raising the mortgage debt; and as to the said two closes, if, instead of construing the devise to the trustees as a chattel interest only, we consider the inheritance as passing to them for the purposes of the trust, then, I conceive, the subsequent direction to pay the rents and profits to him for life, gave him the equitable estate, subject to the payment of that debt; for though the payment of such rents to him is directed to be *from and after* such mortgage should

should be discharged; yet as that (if the fee passed to the trustees) gave no *particular estate* upon which the subsequent limitations might enure as remainders, and as an executory devise, it seems too remote, because the antecedent trust might exceed the period to which executory limitations are restrained. I rather consider such subsequent limitations as giving the present equitable interest, subject only to the said trust, for payment of the said debt, 'as in *Bagshaw v. Spencer*, 2 Atk. 578. And I consider the directions to the trustees, for payment of the *rents and profits to the son*, during his life, as tantamount to a devise of the equitable estate in the lands to him, for life, as in *Garth v. Baldwin*, 2 Vez. 646. And if the legal estate therein became vested in the trustees, under the first devise to them, for the purposes of the trust, the subsequent devise to the heirs of the son, lawfully begotten, I conceive, was only an *equitable or trust estate*, and, consequently, capable of uniting with the son's preceding equitable estate for life in the same closes. But such limitations of the said closes being mere *equitable estates*, or trusts, under this latter construction, their union might be prevented by circumstances expressing the testator's intent, that the *heirs*, &c. should take by *purchase*, which would not be strong enough to control the rule for construing it an estate tail in similar limitations of the *legal estate*.

Now,

Now, the expressions that seem most to imply such an intent here, are the words, *for ever*, subjoined to the words, *heirs of my son lawfully begotten*, and which rather indicate the intent, that such heirs should take *the fee in remainder*, and the legacies of — *1. to the son of A., and children of C. X., payable at the end of four years after the decease of the testator's son, if he died without heirs of his body*, which seems to afford some ground for the inference, that the testator, by his son's *dying without heirs of his body*, meant issue *living at the time of his decease*. However, neither of these circumstances appear to me to amount to a *plain expression or necessary implication* of such intent, which Lord Hardwicke, in the case of *Garth v. Baldwin*, 2 Vez. 655., held requisite to warrant a deviation in the construction of trust limitations, from the rules of construction in *legal limitations*. And I know of no instance of the rule, in *Shelly's* case, being controlled, even in the case of *trust* limitations, by circumstances so slight as those which occur in the present case. In *Bagshaw and Spencer*, the insertion of trustees, to support *contingent remainders*, was a plain expression, as well as clear implication, that there should be *such remainders*; and therefore that case seems to be no authority here.

Upon the whole, therefore, it seems, that the son took either a legal or equitable estate
tail

tail in the *two closes*, subject to the trust, and a *legal estate tail* in the residue of the lands, and that he may, by a recovery, bar the estate tail and remainders; to which end he may, by lease and release, convey the lands to, and to the use of some person, and his heirs, for making him tenant to the præcipe, for suffering a recovery, in which the said tenant should vouch the said *A.* the son, and he vouch over the common-vouchee, and the desired uses of the recovery may be declared in the deed of release.

THAT

THAT a devise to *A.*, and his heirs lawfully begotten, gives an estate tail.

THIS case appears to me of a very disputable complexion. The limitation to *A.*, and his heirs lawfully begotten, would, I conceive, in a deed, have given him an estate in fee-simple, from the omission of words expressing of whose body such heirs were to proceed. But, in wills, the same strictness of expression is not requisite; for the words, *of his body*, are frequently supplied in construction; and Lord Coke tells us, that if a man, by his last will and testament, *devise* lands to a man, and to his *heirs male*, this, by construction of law, is an estate tail; the law supplying the words, "of his body;" vide *Co. Litt.* 27. a. And, considering the progress which our courts have since pursued, in the liberality of construing wills, according to the apparent intent, I rather incline to think the words, "*lawfully begotten*," annexed to the word, "*heirs*," in this case, may influence the construction to an estate tail, because those words, unless meant of

the body of the devisee, would be quite nugatory; for the word *heirs*, in its general application, includes legality of generation of some body; but those words are usual in the limitation to a man's special heirs, that is, heirs of his body; and if, in a devise to a man, and his heirs male, the law supplies the words, "*of his body*," why should it not, in a devise to him, and his heirs lawfully begotten, equally supply the same words, seeing that the words, "*lawfully begotten*," seem as much to point at issue of the devisee in the one case, as the word *male* does to his *issue male* in the other? In the case of *Cburch and Wyatt*, *Moor* 637. there was a limitation of the same nature; but as it was followed by a limitation over, on default of issue, I do not think it an authority in point; but, upon the ground I have above noticed, my opinion rather inclines in favour of the construction of an estate tail, though the case appears to me too dubious to be the subject of any confident opinion.

THAT

THAT the following limitations give an estate tail :

A, by will, says, " I give and devise to B., his heirs and assigns, for ever, all my lands at C., being copyhold; and in case the said B. die, and leave no issue of his body lawfully begotten, then I give the same premises unto his heirs and assigns, for ever."

I AM of opinion, that under the devise to B., above stated, he took an estate tail in the lands thereby devised to him. The first limitation would have given him the fee-simple, had it rested there; but the limitation over, in case of his dying, and *leaving no issue*, I conceive, shewed, that, by *heirs*, in the first devise, the testator meant *heirs of the body*, and reduced the generality of the first devise to an *estate tail*; vide *Cro. Eliz.* 525. *Cro. Jac.* 290. *Com. Rep.* 539. And though the words here are, dying and *leaving*

leaving no issue, that, it seems, makes no difference in such a limitation of *real estates*, though it would, in a bequest of *personal*, be construed to mean, dying without issue *then living*, in order to give effect to the limitation over, as an executory devise, which, in case of personal property, would otherwise be void; vide *Forth v. Chapman*, 1 P. Wms. 663. *Walter v. Drew*, Com. Rep. 373. And as to the word *assigns*, in the first devise here to *B.*, that, I conceive, will not alter the case. It is a word of course included in the extent of the limitation to *the heirs*, if not mentioned, and must be subject to the construction of the word *heirs*. Besides that, a tenant in tail may effectually assign for his own life, and by means of a recovery absolutely in fee. But, abstracted from this mode of satisfying the word *assigns*, any implication from that word can be of no weight, when opposed to the general rule, that a limitation shall not operate as an executory devise, but where the devisee cannot take in any other way; vide *Walter v. Drew*, above cited. And therefore, I conceive, that *B.*, as tenant in tail of the lands in question, is capable of barring the remainder to *D.*, by a recovery in the Lord's Court, or other means usual in the manor, for barring estates tail.

THAT the following devise gives an estate for life, remainder in fee in contingency, with a double aspect.

A. B., by will, in 1727, says, " I devise to my
" son G. B. a tenement at X., for the
" term of his natural life; and, after his
" decease, to the issue of his body, and
" their heirs for ever; but, in case the said
" G. B. shall die, leaving no issue, then,
" and in such case, I give the said tene-
" ment to C., the wife of T. D., her heirs
" and assigns for ever."

G. B. the devisee, T. D., and C. his wife, levied a fine, in 1728, of the tenement, to the use of G. B. in fee. G. B. the devisee at that time had two sons.

THE above case, like all others which depend entirely on *construction*, seems to admit of different opinions. I think it may possibly be the subject

subject of four different constructions: First, That G. B., the son and devisee of A. B. the testator, in 1727, took an estate tail under his father's will, by *implication*, from the words, *and in case he shall die leaving no issue*, and taking the words, *and their heirs for ever*, subjoined to the words, *issue of his body*, as meaning *heirs of the body*, or issue of such issue, and, consequently, as surplusage, being, in that sense, included in the preceding. But, to this opinion, I cannot accede, the estate being *expressly* limited to him, and there being a limitation, extending, as I conceive, to all his issue, and so leaving no occasion to raise him an estate tail by implication, to supply any defect in the former limitation, by carrying the lands to any issue not comprised in that former limitation; and the superadded words, *their heirs*, shewing, that the testator intended the inheritance should vest in the issue, and not in the ancestor. Secondly, That he took an estate *for life*, remainder to his issue *in tail*, and not *in fee*, considering the words, *in case he shall die without issue*, as restraining the words, *their heirs*, annexed to issue of his body, to signify heirs of their bodies, *i. e.* such heirs as should be *issue* of his body. But such a construction, I conceive, would be too strained, and far fetched, the words of *implication* not relating to the *same person*, as the words of *limitation*, to be abridged thereby; for the former, *viz. if he*
die

die without issue, refer to G. B. himself; the latter, namely, *their heirs*, relate to his issue; and I do not remember to have met with any case where a limitation over, upon failure of issue, has been held to abridge a preceding limitation to heirs, generally, but where *both* referred to the *same person*. Thirdly, That he took an estate for life, remainder to his issue in fee; which remainder *vested* in such issue immediately, if born at the decease of the testator (as I presume was the case, in respect of one of the sons at least, from the short interval between the date of the will and that of the indenture, leading the uses of the fine, at which time, it is stated, that G. the devisee for life had issue two sons); and, if not then born, to become *vested* in such issue, at *their births respectively*, subject to be determined or defeated, by the executory limitation over to C., upon G. the devisee for life leaving no issue *living at his decease*. Now this seems to be the effect of the devise, if we give every part of it its literal operation, in the order in which it is penned; for, first, here is a devise to G. for life, then a remainder to his issue and *their heirs*. This would give an immediate remainder in fee to such issue, as they came *in esse*; then comes the limitation over, upon his dying without leaving issue, which, in that event, defeats the fee before given to the issue; for though the words, *die without leaving issue*, are

are not generally, in respect to *real estates*, construed to mean issue *then living*, but signify a *general failure of issue at any time*, the preceding limitation to the issue being in fee, *i.e.* to them and *their heirs*; and therefore, the words, *not leaving issue*, must be confined to signify, not leaving issue living at G.'s decease; so that the fee given to the issue was only defeasible by the executory limitation over to C., in that event, and remained fixed indefeasibly, if G. left any issue behind him. Now, under this construction, I apprehend, that the remainder in fee, being vested in the sons at the time of levying the fine (for, I conceive, they both took equally under the description of issue, according to the opinion of *Powell*, 1 *Lord Raymond* 206., and of Lord Keeper, 2 *Vern.* 545.), it was not barred or affected by it; but, on G.'s decease, his two sons became entitled, equally between them, as joint tenants in fee; and G. the devisee for life had no right to dispose of it by his will; and if his eldest ^{son} did nothing to sever the joint tenancy, then, upon his death, the whole survived to his brother in fee, unaffected by the will of such eldest son; and that brother is, in such case, now accordingly entitled, and not his brother's widow. But I think the objections to this construction are, that it gives the estate to the issue, *before* the testator intended they should

take any estate at all, and, indeed, *eventually*, to such issue to whom the testator seems not to have intended it; for, by giving the estate to C. D., in case of his son's *not leaving issue*, it seems clear, that the testator did not intend that any issue of his son should take, that was not living at his (the son's) decease; and such issue could not possibly be ascertained during his life. And, to remedy this inconsistency with the testator's intent, which arises from supposing the remainder *to vest* in any of his son's issue, during his life, we are under the necessity of considering it liable to divest again; and, by so doing, we subject the estate to an unnecessary *vesting* and *divesting*. Nor would that even answer the desired end; for supposing G. to have had two sons, and the remainder in fee being *vested* in both equally, either of them had done any act to sever the joint tenancy, and died without issue in his father's lifetime, and the other son had survived the father, in that case, as G. did not die without leaving issue, the devise to C. D. would, of course, have failed, and the title to the fee, in one moiety, before vested in the deceased son, would be thereby established and fixed, indefeasibly, in the representatives of the deceased son, contrary to the evident intention of the testator, who meant it only for the issue surviving G. Besides, that this construction

struction would make the devise over to C. operate as an *executory devise*, defeating the remainder in fee, supposed to become vested in the issue, instead of construing it a contingent remainder expectant on G.'s life estate, agreeable to the general rule, that no devise shall enure as an executory devise, where there is a preceding freehold to support, and it is capable of taking effect as a remainder. Now these objections to the construction last mentioned, incline me to prefer that which I am now about to mention. Fourthly, That G. took an estate for life, remainder in *contingency* with double aspect, namely, to G.'s issue in fee, if he should leave any issue at his decease; if not, then to C. D. in fee. This seems clearly the purport and substantial effect of the devise; for, as I said before, it appears that the testator, by giving it to C. D. in fee, in case his son left *no issue*, meant only to give it to such issue as *should survive his son*, and not to any issue that might die in his lifetime.

Upon the whole, therefore, though I think it a very disputable case, my opinion inclines in favour of the last mentioned construction; and if that be the true one, it follows, that G. the devisee for life, by his fine, destroyed the remainder to his issue, (considering it, as I said before, not *vested*, but *contingent*, during

his life, as having, for its object, only issue *surviving him,*) and thereby acquired the dominion over the fee, so as to be thereby enabled to devise it to his eldest son, under whose will it (in that case) passed to his widow, so as to entitle her to it in exclusion of G.'s brother E.

THAT

THAT the following devise gives estates for life, remainder in fee in contingency, with a double aspect.

A., by will, says, " I devise my lands and hereditaments unto my nephew and niece
" *B. C.* and *D.* his wife, to hold the same
" unto the said *B. C.* and *D.* his wife,
" and their assigns, for their natural lives,
" and the life of the longest liver of them;
" and from and after the death of the
" longest liver of them, then I devise the
" same unto the child and children, whether
" male or female, of the body of the said
" *B. C.*, on the body of the said *D.* his
" wife begotten, or to be begotten, equally
" to be divided between them, if more
" than one, share and share alike, as tenants
" in common, and not as joint tenants,
" and their heirs for ever; and, for default of such issue, I devise the same hereditaments unto the survivor of them
" the said *B. C.* and *D.* his wife, and
" the heirs and assigns of such survivor,
" for ever."

Note.

Note.—The will was made in 1755, and proved in 1759. At the time of the testator's making his will, and at his death, there was living one child *E.*, a son of *B. C.* and *D.*, his wife, who was the only issue of the marriage. *E.* died in 1763, and *B. C.* died in 1764. *D.* married again, and settled the estates, and died in 1768.

UNDER the circumstances stated in the above case, I am apprehensive that the remainder in fee, of the premises devised by *A.*'s will, expectant on the estate for life therein devised to *B. C.* and his wife, for their lives, did not absolutely vest in their son *E.*, as he died in the lifetime of both his parents. The limitation to the child and children, is to them expressly *in fee*; consequently, the subsequent words, *in default of such issue*, could not be meant to introduce a remainder, after an estate tail in the children, but must mean, in default of a child of *B. C.* and his wife; but this, if taken absolutely, without reference to some future period,

riod, was an event the testator knew could not happen, as they had a child living, as well at the time of his will, as of his decease. He must, therefore, have meant default of such issue, at some future period; that is, either at the determination of the antecedent estate, from which the limitation to the children was taken up, or else at the death of the father or mother first dying, when the number of children would be ultimately decided. I think the latter period is pointed at by the alternative limitation, to the *survivor* of the father and mother, in *default of such issue*. The probable construction of the limitation, as directed by the circumstance of there being (to the testator's knowledge, I conclude) a child *in esse*, at the time of the will, and at the testator's death, strikes me as a devise to Mr. C. and his wife, for their lives, remainder in contingency, with double aspect, *viz.* to their child or children, living at their deceases, or at least, at the decease of the parent dying first, *in fee*; and, in default of any such child, then to the survivor of the parents, *in fee*. The testator's use of the word *begotten*, expresses his contemplation of the child then in being, and, consequently, shews, that, by the subsequent limitation over, in default of such issue, he could not mean the event of a *total failure* of children at some future period, either that when the preceding estates were to determine, or that where the person to whom the alternative

ternative substitutionary limitation is made, became ascertained, *viz.* the *survivor* of the parents; and, supposing the devise to have vested in the child, yet, I think, it must have done so subject to an executory limitation to the survivor of the parents, to take effect on failure of such child at one of these periods. The existence of a child at the testator's decease, and the nature of the limitation to the children, *in fee*, combine in rendering it impossible to give the alternative limitation to the *survivor* of the parents, *for default of such issue*, any chance for effect without postponing the absolute and indefeasible vesting of the fee in any child, till some such period as I have mentioned. The referring it to the time of the testator's decease would not do it, but leave the substitutionary limitation abortive in the moment of the will's taking effect. That the testator, by the limitation *in default of such issue*, intended to provide for the event of some failure of children of B. C. and his wife, I think, scarcely admits of dispute; he could not mean the event of there never being any such child, which he knew was precluded by the existence of a child at the time of his will, and his death; he must, therefore, have meant a failure at some *future period*; and, as the case affords the two probable periods I have noticed, I rather incline to think, that as there was a failure of children at *both these periods*, the limitation to the survivor of the

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the parents, which, I think, referable to such failure, took effect; and, consequently, that D., upon her husband's decease, took the estate in question, *in fee*, (supposing no act previously done to destroy the contingent remainder to the survivor of herself and husband,) and, consequently, that she was capable of settling it, as she did by the settlement on her second marriage. But though this is the tendency of my opinion, yet I cannot consider the case so clear, as to deter the present claimant from his proposed attempt to recover the lands. The case may probably strike the court in a different light from that in which I view it. Its analogy to the case of *Thicknes v. Liege*, in the House of Lords (7 *Browne's Cases in Parliament*, 223.), may possibly, in my mind, exceed its just limits. In that case there was a bequest of the residue of the testator's personal estate, amongst his daughter's issue, after her death, upon the youngest attaining the age of twenty-one years, the interest being given to the daughter for life, if she survived her husband; and if his daughter died without any child, or the youngest should not attain twenty-one, and none of them left issue, then to other persons; and it was held, that nothing vested or became transmissible in a child who attained the age of twenty-one years, and died in the mother's lifetime; one strong ground of which decision appears to have been, that as the testator's daughter had a

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child.

child born and living at the time when the testator made his will, he could not mean, by his daughter's dying without any child, dying without ever having had any child, but must mean, without any child *living at her decease*; and, consequently, on her death without leaving a child, the subsequent limitation took effect*.

* The claimant abided by this opinion, and never brought his ejectment.

THAT a devise of lands to one, his heirs and assigns for ever, when he arrives at twenty-one years of age, will not vest in the devisee under that age, unless the devise be accompanied with some intermediate disposition of the estate, or of the rents and profits thereof.

A. says, in his will, " I give and devise to my
" cousin B. the lands at L., to him, his
" heirs and assigns for ever, when he ar-
" rives to twenty-one years of age."

B. died under twenty-one.

POSSIBLY the cases of *Boraston*, 3 Co. Rep. 19. *Taylor v. Biddulph*, 1 Eq. Cas. Abr. 188. *Mansfield v. Daggard*, Ibid. 195. *Goodtitle v. Whitby*, 1 Burr. 228. (in all which cases a devise to one after his attaining, or when he should attain, twenty-one years, was held to vest immediately in such devisee, and to descend to his heirs,

notwithstanding his dying under that age), may, by some, be considered and urged as authorities for a like construction in this case, and as grounds for an opinion, that "*when he arrives to twenty-one years*" relate only to the time when *A. B.* was to take the estate in possession, but that it vested in him immediately upon the testator's decease. And I should have been of this opinion, had there been any intermediate devise or disposition of the estate, or the rents and profits thereof, during the minority of *A. B.*, as there was in every one of the cases cited above, and which appear to have been determined upon that very circumstance.

Those cases were nothing else, in effect, than a devise of a particular estate in possession, during *the minority* of a certain person, remainder to that person in *fee*; where the devise to such person, being limited to take effect when, or *after* the period to which the particular preceding estate was limited to extend, was held to create no more of a contingency, nor occasion any more suspension of the freehold in the mean time, than in the common case of a lease for years; and, after the end of the term, *then* remainder over; in which case the remainder vests immediately. This was the express ground of the decision in *Boraston's* case, which seems to have ruled all the subsequent ones; and the general position laid down by the court in the
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case of *Goodtitle v. Whitby* was, that when an absolute property in lands is given, and a *particular interest in the mean time*, until the devisee comes of age, the particular interest operates only as an exception out of the devise which is so made subject to it. But, in the present case, there is no *intermediate disposition* of the estate in question, or the profits thereof; till the coming of age of *A. B.*, when the estate was devised to him, which distinguishes this case from the cases above cited. Here is no preceding estate upon which the devise in question can be considered to depend, and become vested as a remainder, to take effect in possession at a future period; no intermediate interest mentioned, subject to which it may be considered to depend, and become vested as a devise of the absolute property. It seems to be a disposition incapable of taking effect until *A. B.*'s attaining his age; and it follows, that as he never attained that age, it could not take effect at all. And if it should be urged, that here being a devise to him and his heirs, followed by the words, *when he arrives to twenty-one years of age*, the latter words shall be considered only to denote the time when he is to become entitled to the *possession*; the question is, Who shall have the possession in the mean time? for it must be either the devisee himself, or the heir of the testator. The devisee cannot be entitled thereto, if we pay any regard, or allow any sort of effect, to the words, *when he ar-*

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rives to twenty-one years of age. And if we admit the heir of the testator to be entitled thereto, then we destroy the supposition of the estate's being vested in the devisee; for the heir of the testator could not possibly be entitled (as such) under any interest *vested* in the *devisee*.

Upon the whole, for the reasons above noticed, I incline to the opinion, that the estate could not vest in *A. B.*, till his attaining the age of twenty-one years; that the rents and profits, in the mean time, belong to the heir at law of the testator, as an interest in his real estate undisposed of; and that as the devisee did not live to attain his age of twenty-one years, nothing became vested in him, but the devise to him failed in event, and, consequently, that the testator's heir at law is entitled thereto, as undisposed of.

UPON a devise to the right heirs of the testator, his son excepted.

C. B., by will, says, " After the decease of my
" wife, I devise to the eldest son of my son
" B., begotten or to be begotten, all my
" estates in —, for his life; the second
" son, all my estates in the county of —,
" for his life, and so on, in the same man-
" ner, to all the sons my son may have;
" if but one son, then all the real estates to
" him, for his life; and, for want of heirs
" in him, to the right heirs of me the said
" C. B., for ever, my son excepted, it
" being my will he shall have no part in
" my estates."

The testator died, leaving his son B. and four daughters. Upon a *deviseavit vel non*, a verdict was given in favour of the will above stated; and, in a cause in the Court of Chancery, it was decreed, that the rents and profits of the testator's real estates belonged to his son, as a resulting trust, until he should have a son.

The son suffered a recovery, devised the estates away from his sisters, and afterwards died without ever having had a child.

THIS is certainly a case of considerable difficulty, inasmuch that I deem it impossible to form or come at any satisfactory opinion upon it. The devise is here taken up *from the decease* of the wife, without any preceding estate being limited to her, or any body else, as I am informed, to support the limitations to the sons of B., the testator's son, as *remainders*. Therefore, as, no such son was *in esse* at the testator's decease, these limitations must enure as executory devises, as in *Hopkins v. Hopkins, Cas. temp. Talb. 44.*

The utmost extent of any of these limitations appears to have been, an estate tail arising by implication on the last limitation to one such son, (if but one,) for his life; and, for want of *heirs* in him, to the *right heirs of the testator*, excepting his son; for this limitation over, to any person in any shape answering the description of *heirs of the testator*, confined the preceding words, and for want of *heirs of him*, to heirs of *his body*; for there could be no default
of

of heirs general, whilst any person existed capable of answering, in any degree, or under any exception, the description of heirs of the testator : so that the effect of the limitation appears to be an executory devise to a future son of *B.*, and the heirs of his body ; and, in default of such issue, to the testator's right heirs, *excepting his son* ; which limitation to his *right heirs*, if unaccompanied with the *exception*, would clearly have been a nullity in effect, as giving the heir only what he would have taken paramount the will, by his better title, *descent*.

But here, the expressly excepting out of the description of *right heirs* the only person who, if living, could be *right heir*, accompanied with the positive declaration of the testator's will, that his said son should have no part of his estates, &c., amounts to an express declaration by the testator himself, that he did not use the words, *right heirs*, in their technical legal sense, but used them in a qualified or restrained sense, to distinguish and denote persons to whom he meant to devise the estates, from and in exclusion of his son, who was his right heir in the unexcepted proper technical sense of the word ; for the exception itself explains who these persons were, namely, such as, *excepting the son*, or supposing him out of the way, would answer that description. To be sure there is an apparent inconsistency in limiting an estate to *one's right heir*, excepting the person

alone answering and filling that description, as if it were to one's *right heir*, excepting one's right heir; but this only proves, that the testator did not mean to use the words, *right heirs*, in the sense, from which such a contradiction and absurdity must flow, but only to denote such persons as would answer the description, if the excepted person were out of the way. There seems to be no way of giving any effect at all to this ultimate devise, without such a construction, which brings us to the point of the greatest difficulty, namely, whether the words, *right heirs*, may, under such an explanation or qualification, as arises from the exception of the person who is actually the right heir, be used to denote persons not actually right heirs? I think the case of *Walker v. Snow*, *Palm.* 359. so far as it goes, is an authority in the affirmative of this question; in which case, upon a conveyance of lands to the use of the grantor for life, remainder to his sons successively till the sixth son, in tail, remainder to the right heirs male of the grantor, to be begotten *after the sixth son*; this last limitation was held to be a contingent remainder, though it is clear such son could only be right heir male of the testator, *excepting his six first sons*, and their issue male; that is, after the removal of, and supposing the preceding six sons, and their issue, out of the way; nor do I apprehend, that the decree under which *B.* received

received the rents, during his life, at all influenced or affected this question ; for although the testator put a negative on his receiving *any part* of the rents of his estates, yet, so far as the testator substituted no body else in his place to receive the same, he must of necessity be entitled thereto, as undisposed of ; and as no disposition is made antecedent to that to a son of *B.*, the intermediate rents, till the existence of such son could be decided, were undisposed of, no body could claim them from the heir, and of course the heir was entitled thereto.

But, upon the death of *B.*, the contingency on which the limitation, to a son of him, being determined, the person to whom the estate was limited over, in default of such son and issue of his body, I conceive, took effect, if those persons are ascertainable under the description used by the testator ; and the law will admit of their taking under such description. That the persons intended are ascertainable according to the apparent intent of the testator ; that is, that he meant such persons as would be his right heirs, if his son were out of the way, as he has endeavoured to put him, by the exception ; I think, there can be little question ; and that they may take under such a qualified, restricted, or rather explained sense of the words, *right heirs*, I think, the authority above cited, and also, in some degree, the several

cases wherein a person has been admitted to take under the description of heir special in the lifetime of the ancestor, or in the lifetime of an *heir general*, (in either of which cases, the description of heir, in its technical sense, was inapplicable,) may be urged as authorities; and, admitting the description to have been sufficient, the persons described must take by way of executory devise, they taking after or in the place of a preceding devise, which was executory, and, consequently, no act of the heir at law could bar them. Upon these principles, I think, the claim of the daughters of *C. B.* has a very probable foundation, such as, were it my own case, I should certainly think it incumbent on me to try, by an ejectment, against the devisees of their brother *B.* But though my opinion inclines, for the reasons I have delivered, in favour of the daughters, yet the case appears to me to be of so new a complexion, that I cannot pretend to deliver, or mean to be understood, as delivering my opinion with any sort of confidence.

UPON the last-mentioned devise, “ to
“ the right heirs of the testator, his son
“ excepted,” where the effect of those
words is considered in a different view.

In the case last stated, one of the four daughters died, leaving children, and the survivors, in consequence of the preceding opinion, brought ejectments; and, in *Michaelmas* term 24th *Geo. III.*, obtained judgment against the son's devisee. They afterwards contracted for sale of the estate; and the concurrence of the children of the deceased daughter being required on behalf of the purchaser, it became a question, Whether the share of the deceased daughter was transmissible to her representatives?

THE question, Whether the share of the deceased daughter was transmissible to her children? seems to me to depend entirely on the point,

point, Whether the devise to the right heirs of the testator, his son excepted, imported a tenancy in common to the persons answering that description? for it is very clear they could not take as coparceners, as the existence of the son absolutely prevented their taking by descent. Their title must have been by purchase under the will, as persons answering the description of heirs at law of the testator, his son excepted; which description operated as a *designatio personæ*, applicable to such daughters, who, if the son had been out of the way, (as the exception put him in respect to the lands so devised,) would have been heirs of the testator; and the judgment in favour of the three daughters has decided, that this devise vested in the daughters (expectant on the preceding estates limited to their brother's sons, which, I conceive, could not exceed an estate tail at most) *immediately on their father's decease*, and was not a remainder contingent to such persons as should answer the description of heirs at law of the testator, at the decease and failure of sons of his son B.; for, had it been so, the reversion, in the mean time, would have descended to such son, and his recovery would have destroyed such contingent remainders, and the fee discharged thereof would have passed by his will. I therefore consider it as admitted, that the said remainder became vested in the four daughters, upon the decease of the testator, as persons described

scribed by the words, *heirs of the testator, his son excepted*; and as the devise was to such persons for ever, it, of course, gave them the fee.

Now, as there are no words in that devise expressive of a tenancy in common, between or among the persons thereby described, nor any thing in the nature of the estate devised to them, inconsistent with a joint estate, I do not see what is to prevent their taking as joint tenants, in the same manner as if the devise had been to them by name; and if so, on the decease of the one, without any disposition of her share, or any act by her or her sisters to sever the joint tenancy, that share survived to her sisters, and was not transmissible to her children. The case cited from *Croke Eliz.* 431. appears to be directly in point; for though it may be observed that, in the case so cited, the devise seems to have been to the daughters by name, and their heirs, and not to them by the description of heirs; yet that does not distinguish it in effect from the present case; for whoever admits that it operated as a devise to the daughters in fee, admits, I conceive, it was in effect a devise to the daughters, and their heirs, which would be exactly the case cited. The devise was *to the right heirs of the testator, his son excepted*; what was this but a devise to persons answering a certain description, and the

same in effect as if it had been to such persons for ever, had the testator said to such persons for ever, as would be my heirs at law, if my son were out of the way? I think it could hardly have been contended, that such persons could take otherwise than jointly, as they could not take by descent, on account of the existence of the son. The daughters were such persons, and therefore I think the conclusion extends to them.

It does not appear to me that any difference in the mode of describing the objects of a devise, unless in case of heirs at law, which the daughters were not, can alter or vary the nature of the estate devised. A limitation (except in tail) to persons, whether ascertained by name, or other circumstance of description applicable to them, I apprehend, makes them joint tenants, if there are no words to sever the interest. In the present case there are none; and if they are to take in common, it must be by implication; and if there is any ground for an implication of that sort, I conceive, it must be in the description of heirs of the testator, &c. that thereby the testator meant not only that the persons answering that description should take, but that they should also take as if they were heirs. But this intent could not take effect, because they could not take as coparceners;

parteners; and to build one implication upon another, by arguing, first, that a devise implies, that persons should take as co-heirs in coparcenary; and, secondly, that, from this implication, it is to be inferred, that because they could not take as coparceners, they should take as tenants in common, seems to be running from implication into mere conjecture, and that too contrary to the implication from which it is supposed to proceed. If the devise to them as heirs implies any thing in respect of their mode of taking, it must be, that they should take as heirs in coparcenary. This is inconsistent with their taking as tenants in common, and, consequently, cannot imply that they should take in common; and if the devise implies nothing in respect to their mode of taking, they of course took as joint tenants.

Upon the whole, therefore, it seems to me, that the sisters took jointly, and, consequently, that the share of the deceased survived to the other two; and if so, the issue of the deceased sister are not necessary parties to make a title to a purchaser. But, considering that this point may strike other gentlemen in a different light, as it has done the counsel already consulted on behalf of the purchaser, I think such purchaser cannot be advised to take the title subject to the question, and, consequently, that, in order

der to avoid it, he will act prudently in requiring the concurrence of the children of the deceased sister in the conveyance, though I cannot, for the reasons I have mentioned, consider them as entitled to their mother's share.

THAT

THAT the remainder limited by the following devise is not contingent, but vested :

A., by will, says, " I devise to my eldest son
" B. my estate called X., to hold the same,
" and to take the rents thereof for his own
" use, until my son C. shall attain the age
" of twenty-one years, in case my said son
" C. shall so long live ; but, if my said
" son C. shall die under age, and without
" issue, then to hold the same as afore-
" said, until my son D. shall attain his
" age of twenty-one years ; and from and
" immediately after my said son C. shall
" attain his age of twenty-one years, then
" I give my said estate called X. to my
" said son C., his heirs and assigns, for
" ever ; but in case my said son C. shall
" die under age, and without issue, and
" my said son D. shall live to attain his
" age of twenty-one years, then I devise
" the same to my said son D., his heirs and
" assigns, for ever."

HAD

HAD the above case come before me in the first instance, and before it had been the subject of any other opinion, or of any judicial decision, I should have been of opinion, that C., the testator's son, took a *vested estate* of inheritance, subject to, and in remainder expectant on, the preceding chattel interest limited to his elder brother, till he, C., came of age, if he so long lived.

The general tenor of cases (as observed by *Blackstone*, in arguing the case of *Denn v. Satterthwaite*, 1 *Black. Rep.* 520.), ever since *Boraston's case*, 3 *Co.* 19., are strong to this purpose. Some of these cases have been where the first limitation was for the *benefit of other persons* than the devisee of the inheritance; in others, the particular interest first limited has been in trust for him. The present case is of the former description, and, I think, on that very ground, is the stronger for the devisee of the inheritance; because clear of the objection, that a chattel interest for the benefit of a devisee, seems inconsistent with an intent of his taking

taking *the vested inheritance* at the same time. The decisions, however, have been in favour of the vesting of the inheritance in both cases. It is true that, in the present case, the devise of the fee to C. on his attaining twenty-one, is not *absolute*, but the estate is given to his brother D. on C.'s dying under age, and without issue.

But this circumstance does not appear to me to take the present case out of the reason of the authorities cited in favour of C. Had the limitation over to D. been absolute, and made to depend on the *only possible alternative* to the event on which the estate is expressly limited to C., viz. C.'s dying under twenty-one; there might, perhaps, have been some ground to say, that the period of the *estate's vesting* was postponed till the event of C.'s attaining twenty-one should be decided, as the disposition then might have been considered as contingent, with a double aspect; *complete* on one hand, if failing on the other. But the limitation to D. is not to take effect on the failure of the event on which the inheritance is expressly limited to C., and therefore is no complete alternative to or substitute for it, so as to warrant the construction of the two limitations being hinged on one common contingency. So far from it, the limitation over to D. is on an

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event

event which implies an idea, and, consequently, intent, in the testator, that the preceding limitation to C. would be effectual, if he did not limit the estate over to D., in the event of C.'s death under twenty-one, and without issue. For if the testator had not considered the estate as transmissible to the issue of C., in case of his decease under twenty-one, it was nugatory to *connect* the failure of such issue with his death under age, as part of the condition on which the estate was to go over; and it seems clear, the estate could not, in that event, be transmissible to such issue, to whom no devise thereof had been made, unless they could take by descent from their father. Can there be a doubt, that the testator intended the *issue* of C. dying under twenty-one should take? Would he have given it over to D., in the event of C.'s dying under twenty-one *without issue*, and have left it to descend to his own heir at law, if C. died under that age *leaving issue*? Could the testator entertain an idea, that C.'s issue, if not intended to take themselves, should prevent D.'s taking, when he devised the estate over to D. on C.'s death under age, and *without issue*? The latter part of the restriction is manifestly intended to prevent D.'s taking in *exclusion* of *such issue*. If so, the intent is manifest, that such issue should take. Such issue, it seems, cannot take, unless we consider the estate of inheritance

heritance as vested in C. The authorities in point warrant such a construction; and therefore, I am of opinion, that it would prevail in the present case. It follows, that I cannot advise X. to prosecute the appeal in question.

THAT a devise in trust, for the first son of *A.*, when he attained the age of twenty-five years, is not a condition precedent, which must happen to give effect to the subsequent limitations, but only a precedent estate, attended with such limitations.

X., by will, gave to *D.* and his heirs, his lands at *Y.*, upon trust, for his wife, for life; and after her decease, and payment of annuities and certain debts, to convey the same unto and to the use of the first and eldest son of his cousin *A.*, when such first son attained his age of twenty-five years, in case his said cousin should have or leave any such who should attain his said age of twenty-five years, for his life only, with remainder to trustees and their heirs, to preserve contingent remainders during his life; and after the decease of such first son, to his first and other sons in tail-male, successively; and, for default of such issue, to the use of the second, third, and all and
every

every other the son and sons of the body of the said *A.*, lawfully to be begotten, severally, successively, and in remainder, one after another, in order of birth, for and during the term of his and their natural life and lives only, with remainder to trustees to preserve contingent remainders, with the like remainders to their first and other sons in tail, with a preference of the elder successively to the younger; and, in default of such issue, to convey to *B.* for life, and to his first and other sons in tail, remainder to *C.* and his first and other sons in tail, remainder to *A.* in fee.

A. had one son living at the death of *X*, but who died under twenty-five, and he has no other issue. *B.* is living. *C.* is dead without issue.

It seems to me, that the limitation to *A.*'s son attaining the age of twenty-five years, may be understood as confined to his *first and eldest son*, and not to mean, *his first and eldest son attaining that age*. For the devise is to his *first*

and eldest son, when such first son should attain his age of twenty-five years. And though the words, "in case his said cousin should have any such who should attain his said age of twenty-five years;" may be urged as extending it to the first son attaining that age, yet, if we refer the word *such* to the son before mentioned, it will then be, of such first son, and the limitation over to the second and other sons of A. is not attended with any such restriction. This construction, I think, is warranted by the words, and will support the will, in the event that has happened; whereas the contrary construction would probably subvert the greater part of it; and therefore I choose to adopt the former.

Under this construction, as A. had a son born in the testator's lifetime, to answer such description of his first and eldest son, I think the limitation to him, on his attaining twenty-five years of age, was good, which otherwise would not only have been void in itself, but might have precluded the validity of the subsequent limitations. And if that limitation was good, the subsequent limitations, which must at farthest have vested on such son's attaining twenty-five, I think, were also good, and took effect accordingly, on the death of such first son: For I do not consider the preceding

preceding limitation to the first son of *A.*, when he attained the age of twenty-five years, as a condition precedent, which must happen in order to give effect to the subsequent limitations, but only as a precedent estate, attended with such limitations, as in the case of *Scatterwood v. Edge*, 1 *Salk.* 229. *Gulliver v. Wickett*, 1 *Wils.* 105. I therefore incline to think, that the contingent limitations to *A.*'s second and other sons are still subsisting; for though they are *contingent*, the legal estate in the trustee supports them; and though confined to their lives, they are not void on that account; for an estate for life may be limited to the unborn child of a person *in esse*, but the limitation to *their* first and other sons is void; though, upon the manifest intent of the testator, that the estate should go to the issue male of such sons of *A.*, and not go over till failure thereof, I apprehend, the Court of Chancery might decree estates in tail male to *A.*'s sons, according to the case of *Humberston v. Humberston*, 1 *P. Wms.* 332. Subject to these contingent estates, *B.*, the devisee, appears to be entitled for his life, remainder to his first and other sons, successively, in tail male; remainder to *A.* in fee; for *C.*, it seems, is dead without issue. As to *D.*, he appears to have taken the whole legal estate in

fee, for the purpose of the trusts; and therefore, all the above estates are merely *equitable*, or trust estates. These are my sentiments on the construction of the will; but I think it a case of difficulty, and liable to different opinions.

THAT

THAT the following words in a will give that sort of executory devise, whereby the limitation over, on a particular event, is made to defeat a fee simple previously vested.

X., by will, says, " I devise my lands and tenements at *P.* unto my wife, for her life; and, after her decease, I give the same unto my daughter *B.*, and to her heirs and assigns for ever; but it is my will, that if the said *B. X.* my daughter shall die before attaining her age of twenty-one years, without issue of her body lawfully to be begotten; or if such issue, if any, shall also die before attaining his or her age or ages of twenty-one years, then, from and after the death of the said *B. X.* my daughter, and of such issue so dying as aforesaid, I devise the same, so given to the said *B.* my daughter, and her heirs, as aforesaid, unto my wife, for her life; and, after the death of my said wife, and of my said daughter *B.*, and such issue so dying as aforesaid, I devise the same premises,

" so

“ so given to the said *B.* my daughter,
“ and her heirs, as aforesaid, unto *A.* my
“ daughter, and to her heirs, for ever.”

THE difficulty of this case seems to me to rest on the ambiguity in the reference of the words, *such issue, if any*, in the devise over to the wife, and daughter *A.* If, by these words, we understand *only issue*, which *B.* might leave on her *dying under the age of twenty-one*, then, as *B.* has attained that age, the executory limitation over has failed, and the fee simple first devised to her is now become indefeasible; and, if so, she may dispose of the estates by will.

In all events, this will be the construction, if we consider the testator as providing only for the contingency of his daughter *B.*'s dying under twenty-one, *either without issue, or leaving issue that should not live to attain that age*; and this appears to me the most probable construction; for the contingency of *B.*'s dying before her attaining her age of twenty-one years, I think, runs through the whole devise over, and is connected as well with the event of her

her not leaving issue, as of her leaving any that should not live to that age. The testator's intent appears to have been, that if *neither B., nor any issue of her*, attained the age of twenty-one, then the estates should go over to *A.*, and that both herself and her issue, if she had any, must die under that age to entitle *A.*

The clause containing the devise over is not quite perfect, and requires some words to supply it; and, I conceive, it is most consistently supplied by reading it thus, namely, "If the said *B. X.* my daughter shall die before attaining her age of twenty one years, or without issue of her body lawfully begotten, or leaving issue, and such issue shall also die, &c." The contingency of her dying without issue is expressly connected with that of her dying *under twenty one*. The alternative to her dying *under age without issue* was, her dying *under that age leaving issue*. Indeed, the latter contingency of *B.'s* issue dying under twenty-one seems to me *expressly connected* with the event of *her own death under age*, by the word *also*, when the testator says, *or, if such issue, if any, shall ALSO die, &c.* Here the word "*also*" has no proper object of reference to connect the death of the issue with, but the death of the mother, as before expressed, and is equivalent to *likewise, or, as well*

well as, their mother; and the coupling the death of B., and her issue, with the copulative conjunction and, in all the subsequent clauses of limitation over, corroborates the construction. Besides, here is no devise over in the event of B.'s dying after twenty-one, without issue. And it could never be the testator's meaning, that the estates should go over in the event of B.'s dying after age, leaving any issue that should not live to twenty-one, and yet not go over on her death without leaving any issue at all. But we incur this inconsistency, if we do not consider the latter part of the contingency, "or, if such issue, if any, &c." as coupled with the event of B.'s dying under age, as well as the former, namely, that of her dying without issue.

Upon the whole, therefore, I incline to the opinion, that the devise to B. was a devise in fee, with an executory devise over to her mother for life, and to the sister A. in fee, on the event of B.'s neither living to attain the age of twenty-one years herself, nor leaving any issue that should attain that age; or, in other words, of her dying under twenty-one years of age, without leaving issue that should live to attain that age.

If I am right in this opinion, the contingency on which the devise depended, has failed by

by her attaining twenty-one; and, as her estate in fee is thereby become indefeasible, she may dispose of both freehold and copyhold, as she pleases, by will, or otherwise, (supposing the copyhold properly surrendered,) whether she dies without issue or not, either in the lifetime of *A.*, or afterwards. As to *B.*'s taking an estate tail, I see no sufficient ground for it; for whether we consider the event of her leaving issue, as coupled with that of her own death under age, or not, yet it is clear, the limitation over was, in the event of her attaining age, confined to the contingency of her *not leaving issue that should live to attain twenty-one*, which is inconsistent with the nature of an estate tail. I therefore cannot see any necessity for her suffering recoveries in this case. But as one of the gentlemen, of whose opinions copies have been left with this case, has suggested a doubt on this point, it may be prudent to obviate the like doubt in future, by suffering recoveries of the several estates.

THAT

THAT a devise to executors, of lands in trust, to sell, is within the statute of 21 Henry VIII. c. 4., providing, *that where lands are willed to be sold by executors, though part of them refuse, yet the rest of them may sell.*

Directions for a conveyance under those circumstances.



THIS being a devise to *executors*, of lands to be sold *by them*, I apprehend, it is within the statute 21 Henry VIII. c. 4., whereby it is provided, that where lands are willed to be sold by executors, though part of them refuse, yet the rest might sell; vide *Co. Litt.* 113. a. And the case of *Bonifant* and *Sir Richard Greenfield*, *Cro. Eliz.* 80., seems directly in point. I therefore, conceive, that the two acting executors, in this case, might sell the lands, upon the refusal of the third to concur therein; and as the nephew's formal renunciation of the executorship,

would manifest his refusal to take upon him the administration and discharge of the will, I think, it would be proper, on that account only, though useless in any other respect; for it would neither divest him of any estate vested in him by the devise, nor bind him from hereafter coming in to prove the will, and act as executor, if he pleased, it being made during the lives of co-executors who have proved the will.

But, as the statute above referred to, expressly provides for the cases, where part of the executors refuse to take upon them the administration and charge of the will, &c. I think the formal renunciation of the executorship desirable, as evidence of the refusal to take the charge or administration of the will. But although I think, that after such renunciation by the nephew, the two sons and acting executors might, by virtue of the act referred to, make an effectual and valid conveyance to a purchaser, of the lands in question, yet, as it is out of the course of common practice, and this is the case of an actual devise of the lands to the executors, in trust to sell, which is not expressly mentioned in the said statute, I should, to avoid all question from the novelty of the proceeding, and render the title *perfectly marketable*, rather think it prudent for the purchaser to require the concurrence

currence of the said nephew in the conveyance ; or that, previous to the conveyance by the other two executors, he should release to them all his interest in the trust estate ; or he might, upon a bill in equity, filed against him for that purpose by the cestuique trust, or persons interested, making the other executors parties be discharged by the court from the trust, and directed to join with the other executors in conveying the lands, so as to vest them in the said other executors, and some other new trustee, to be appointed in his room, upon the trusts in the will, who may afterwards all join in the sale and conveyance of the lands accordingly. And, abstracted from the view of avoiding all future question, that might affect the facility of going to market with the title, the purchaser's exemption from seeing to the application of the purchase money, probably requires the concurrence of *all* the executors or trustees *in* the receipt for that purchase money, and therefore, may render it prudent for him not to accept the title without such concurrence, unless under the sanction of a court of equity.

As to the mortgage, I conceive, it only revoked the devise of the lands *pro tanto*, and that such devise remained good, subject only to that mortgage. The conveyance, as proposed, to a nominal purchaser or trustee, for the purchasing

chasing executor, would be the regular and properest mode; but I cannot think a purchase by either of the executors advisable in any shape, as all purchases of trust estates, or any part of them, by any trustee thereof, are highly discountenanced by our courts of equity; vide *Whelpdale and Cookson*, 1 Vez. 9.

I therefore do not think, that *A. B.* and his sons can, by any means, make a title, otherwise than subject to the eventual right of any issue of the father or sons, who, in case of the deaths of any, or of all the present sons, in the father's lifetime, may happen to be the heir of his body at the time of his decease. Subject to such contingent claim, I think a title may be made, by the father and his three sons joining in a fine; that is, I think, that a fine by the father and his three sons will make a title, in the event, either of any one of his said sons becoming heir of his body, at the time of his decease, as the intail will then have attached in such son; and all claiming under that intail afterwards, must claim through him, and, consequently, will be barred by his fine; or, in the event of all the said sons dying without issue in their father's lifetime, and his dying without any other issue. For the inheritance in fee, which descended to him from his brother *E.*, expectant on failure of heirs of his body, will, of course, pass by his own conveyance. But if *A. B.* is not heir of the testator, I think, such heir should also join in the conveyance, in respect of the freehold, which seems to have descended to him during *A. B.*'s life.

THAT

THAT where lands are subjected to a charge by a will, with a devise to the heir in fee, restraining possession till payment of the charge, the heir will still take by his title of descent, and not by purchase.

IT seems now to be clearly settled, however formerly disputed, that a charge by a will does not make the heir, to whom the land is devised so charged, a purchaser; *vide*, amongst other authorities, *Allen v. Heber*, 1 *Black. Rep.* 22. and the cases there cited. And that, in order to make him a purchaser, the tenure or quality of the estate must be altered; that is, he must take an estate different in quantity or quality from what he would have done if the estate had not been devised, but left to descend to him. Now, in the present case, if there had been no devise at all to the heir, but the charge only had been made, as it now is, of 400*l.* to the daughter, with power of entry, possession, and perception of the rents

and profits, till the charge was paid by the heir, the lands would have descended to the heir, subject to such charge, and power of entry and possession, for enforcing the payment thereof; and the devise to the heir in fee, with a restriction of his possession, does not prevent the fee descending to him, subject to the power of entry and possession thereby given to the daughter, till her legacy is paid.

The testator has not disposed of the fee or inheritance, or given it to any other person than his heir; nor has he given him an estate tail, or any other estate than he took as heir; but has only subjected the estate first devised to his heir, to a temporary right of possession in the legatee, limited to the time of the heir's paying the charge of 400 l.; that is, he has in fact devised the estate to his heir in fee, subject to the payment of 400 l., and to the retention of the possession from such heir, by the legatee, till he should have paid her the legacy of 400 l., which, I conceive, was no more than imposing a penalty upon him, to enforce the payment of the legacy, without, in any degree, altering the tenure, quality, or quantity of the estate descended to him, that being a fee in the first disposition. Had the testator indeed devised the fee, in the first place, to his daughter, and then, upon his son's paying 400 l. to her, devised to him, the case would have

have been different, as the descent would then have been prevented by the previous devise of the fee to the daughter. But, in the present case, the fee not being devised away, but expressly given to the heir, I conceive, it is the same thing as if it had descended to the heir, subject to the charges and power of possession given the legatee for enforcing the payment thereof. A devise is void, where it gives the same as the heir would have taken by descent. The devise here is of that description.

The distinction taken by Chief Justice *Holt*, in the case of *Emerson v. Incbbird*, 1 *Ld. Raymond* 728., is where the devise makes any alteration in the limitation of the estate, from what the law would make by descent, and where the devise conveys the same estate as the law would make by descent, but charges it with incumbrances. Now, in the present case, the devise is to the heir in fee, which is the same estate, in point of limitation, as the law would make by descent. But here it is charged with 400*l.* and a right of possession to the legatee, till payment thereof by the heir. These are the incumbrances; so that the case seems to me to fall under the latter branch of the distinction taken by *Holt*, and to come within the reason of the case of *Clarke v. Smith*, 1 *Com. Rep.* 72., where a devise to the heir,

provided he should pay 100*l.* on a contingency, was held not to break the descent.

And though, in the case of *Miles* and *Leigh*, at the Rolls in 1738, the heir was held to take by purchase, and not by descent, yet that appears to have been a construction of necessity, in order to substantiate the charge, in the event that happened, there being no express charge of the legacy upon the land in question; and its being given upon the coming into possession of the devisee in fee, who never came into possession, and consequently, if he had not taken by purchase, but by descent, those who succeeded, not claiming from or under him, but by descent, as heir to the testator, would not have been liable to the payment of the legacy. But, in the present case, there is no reason at all for such a construction in respect to the legatee, the lands being expressly charged with the legacy, and a right of possession given her to enforce the payment, which makes her equally secure in all events.

If, indeed, this were to be considered as a devise to the daughter in fee, with a conditional limitation over to the son and his heirs, upon payment to her of the sum of 400*l.*, then would the descent be broken. But, I apprehend that the first express devise to
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the son, and his heirs, in this case, and the express charge of the sum itself upon the lands so devised, besides the possible remoteness of the event on which such supposed conditional devise was to take effect, stand in the way of making such a construction ; or, considering the limitation to the son as an executory devise, to take effect on such payment. And, I think, the devise, so far as respects the right of possession given her (the legatee), can only be considered in the nature of a security, or means of enforcing the payment of the legacy ; and that, subject thereto, the son took the fee, as he would have done if there had been no devise at all to him expressed in the will. In short, it appears to me, that if the heir at law had not been mentioned in the will, but the charge and benefit of possession to the daughter had been independent thereof, the heir at law would have taken just the same estate that the will gave. And, on that principle, it appears to me, that he takes by descent, and not by purchase, the interest of the legatee, or any stranger, not being concerned in such construction.

THAT

THAT in purchases under recent wills, either the heir of the testator should be a party to the conveyance, or the will proved in Chancery, to render the title perfectly marketable.

I CANNOT say, that the concurrence of the heir at law of *A.* is absolutely requisite. It is desirable to prevent any future occasion of proving the will against him. If there be no sort of doubt of the due execution of the will by the testator; the witnesses are respectable men, as stated, and whose signatures are well known; I do not, for my own part, see any risk in dispensing, as well with his concurrence, as with proving the will in Chancery, for perpetuating the testimony of the witnesses thereto. But, as it is the regular, and almost constant practice, in the case of recent wills, to have the concurrence of the heir at law, or the will proved in Chancery, for perpetuating the testimony of the witnesses thereto, in order to avoid
any

any future difficulty in proving the will at law against the heir, after the witnesses are dead, I cannot say I think that the title will be so *marketable* without one or other of those steps. A future purchaser or mortgagee will probably require it.

THAT

THAT the statute of 7th of *Anne*, chap. 19., extends only to express or plain trusts, and not to constructive or implied ones, though a case is stated on which it was extended to a trust arising under a decree; a petition, by way of experiment, is recommended for an infant to convey under that statute, where there had been a previous decree for a sale, and a purchase under it, and an order for a conveyance.

THE *inheritance* is devised, in the first instance, to the trustees, the limitation being to them *and their heirs* (subject to the debts, &c.). The trusts to support contingent remainders required the *legal estate to vest in them*, during the life of *A. B.* the elder, but no longer. After that, the estate for life is devised *to the use* of the several *cestuis que use*, which was equivalent to saying, that after *A. B.*'s decease, the trustees should *stand seised to the use* of the several *cestuis que use*. And I therefore incline
to

to think the construction may be, that the *use was executed* in the trustees and their heirs, *during the life of A. B. the elder*; and, after his decease, in the *persons to whom the use was afterwards limited*; as in the case of *Lady Jones v. Lord Say and Seal*, *Vin. vol. 8. 262. cas. 19.* If so, I do not see how a *legal title* can be made, without the concurrence of *A. B. the younger*, which, as some of the subsequent devisees in tail cannot be found, or will not join, ought to be by a *recovery*, in order to bar the remainders to them.

But the infancy of *A. B. the younger* prevents his concurrence, unless he could be considered as a trustee for the purchaser, *within the statute of 7th Anne, chap. 19.* But it seems to be established, that only *express or plain trusts* are within that act, and that it does not extend to *constructive or implied trusts*. It is true, here has been a regular suit, in which the interest of the infant was before the court, and a *decree* for the sale, and for a conveyance to the father, by all *proper parties* (vide *Hawkins v. Obeen*, 2 *Vez.* 559.); and *A. B. the elder*, has already more than purchased the estate, by the payment of incumbrances to above its whole value, and become *beneficially entitled to the whole thereof*; and has been reported and confirmed the *purchaser, under a decree for sale*, and obtained an order for the conveyance of the estate to him, by all *proper parties*. And, upon these grounds,

grounds, it possibly may be urged, that all parties before the court, and bound by the decree, are, so far as they are *legally interested*, in fact, *mere trustees* for him, without a spark of beneficial interest in themselves; and that these circumstances, of such actual full purchase, and the decrees for sale, and conveyance thereupon, distinguish this from the case in 2 P. Wms. 549. *ex parte Vernon*, where the Court laid it down as a rule for the future, not to direct a conveyance by an infant, in such a case as was then before them, upon mere *petition*, and without a decree, which there is in the present case; and also from that of *Goodwin v. Lister*, 3 P. Wms. 387. and the anonymous case subjoined to it in a note; in neither of which there had been a *previous decree* for a sale, and a purchase under it, with an order for a conveyance, as in the present case.

This distinction, perhaps, may appear sufficient to induce one to the experiment, by a petition for the infant, to convey as a trustee under the act of *Anne*. If he could be deemed so, then he might suffer a recovery; by guardian, that would answer the end. But there does not appear to me sufficient reason to expect success in the application; for, in the anonymous case of *Goodwin* and *Lister*, the Chancellor considered the act of *Anne* as not making any provision for infants to convey in pursuance of decrees of the Court. Though I have the note of a case where,
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upon a *decree for a partition* between coheirs, it was declared, that one of them *being an infant*, should be considered as an infant *heir within the said act of Anne*, in respect of the *legal estate vested in her*, in the shares of any of the other parties; and such infant, accordingly, joined in a conveyance of such legal estate to the other parties. It was upon two bills, the one by *John Price*, and *Penelope Lee*, and *Dorothea Chester the infant*, *J. Robinson*, and *Dorothy* his wife, against *R. Oneby*, *Sir J. Chapman*, *F. Chester the father*, and *F. Chester the son*, and others. The other by *Robert Oneby*, against *J. Price*, and *Penelope Lee*, and others. The decree, according to my note, was made on the 15th November 1745. I mention this case only as an instance wherein the statute of *Anne* was not confined merely to *express or original trusts*, but extended to trusts *arising under a decree*; for, in other respects, it bears no analogy to the present case, as the partition was for the infant's benefit, and what she was compellable to make *by law*.

Now, if *A. B.* the infant cannot be considered as a trustee within the said act, I do not see how a *legal title* can be made to the estate in question, until he comes of age. There may, I conceive, be an order obtained for his joining then; but he may die under age; and as the other children of *A. B.* are not parties

parties to the suit, there can be *no order for them* to join in that event.

Upon the whole, *A. B.* the elder seems to have an *equitable title* to the lands; and that is the only title, I think, he could make to a mortgagee, as to the inheritance after his own life, if he were to accept a title in the manner proposed by the parties. But the accepting such a conveyance, without an order to be quieted in the possession, and for the infant to join when of age, would close the suit, and leave him no remedy under it against his son for such conveyance, without a new bill; and such an order, as I have observed before, being confined to his *eldest son* only, may fail in effect, by the death of that son under age. And a mere equitable security, where it is for a sum amounting to near the value of the estate, and a bill may probably be hereafter requisite to complete the title, is not to be recommended to a mortgagee.

If the money advanced bore but a small proportion to the value of the estate, it would be a different case, and the equitable security might be deemed adequate, though still not altogether marketable, as a legal one. If the title be accepted, as proposed by the parties, with such an order as I have mentioned, I would advise the conveyance to be by feoff-
ment

ment from *B.* the elder, and the trustee, to *B.*'s own trustee. The legal fee, thus acquired, whilst it continues, I apprehend, will enable him, his heirs and assigns, to maintain ejectment against any but the persons in remainder under the will; and, I conceive, any claim by them, *at law*, will be repellable in equity, by him, his heirs or assigns, claiming under his purchase; and the legal forfeiture, worked by the feoffment, will of course be immaterial, as it cannot be taken advantage of against his equitable title. But I do not see how his title can be rendered complete in law, and delivered from the necessity of any future resort to a court of equity, without the concurrence of his eldest son, in the way I have mentioned. What I have said relates immediately to the *freehold part* of the estate. As to the copyhold, I conceive, that the trustees took the customary fee, under the first devise to them and their heirs; and that the subsequent *uses*, as to them, were *mere trusts*; for the use could not be executed in them, copyholds not being within the statute of uses; and, consequently, I think, that a surrender of them from the surviving trustee, after he has been admitted, and an admittance upon such surrender, would be sufficient to pass the whole customary estate to Mr. *B.*'s trustee in fee. Mr. *B.* himself might join in such surrender.

UPON the severance of a joint-tenancy in a remainder or reversion, and that a devise to the heir, and another person, after the decease of the testator's wife, gives her an estate for life by implication.

B., by will, says, " I devise unto my brothers
" *C. D.* and *E. F.*, and to their heirs for
" ever, from and after the decease of *G.*
" my wife, and in case I shall leave no
" issue by her, which, if I do, I then give
" all my lands in *X.*, not already settled
" in marriage, unto such issue, and their
" heirs for ever, all my lands in *X.*, or
" elsewhere in *Great Britain*, to hold to
" them jointly, and their heirs, for ever."

The testator died without issue, leaving *G.* his wife, who, under the settlement, was entitled to an estate for life in the lands therein comprised. *C. D.* (as heir) entered and enjoyed the lands not in settlement, and *E. F.*, during the life of *G.*, by indentures of lease and release, in order to sever the joint tenancy, conveyed his moiety of the lands to a trustee.

I HAVE

I HAVE no doubt, that a joint-tenancy in a *reversion* or remainder, can be severed by either of the parties, during the continuance of the particular estate, equally as if in possession; a *reversion* or *remainder* being equally a *vested interest*, and capable of being *disposed of*, with an estate in possession. Considering the estate devised to the two brothers as a *remainder* or *reversion*, expectant on the decease of the testator's widow, I think, her estate was no impediment or obstacle to the severing the joint-tenancy. Now, as to the *settled estates* in which the widow had an estate for life, the devise, *from and after her decease*, I conceive, was an immediate devise of the *reversion expectant on her decease*; vide *Weale v. Lower*, *Pollexf.* 66. and *Badger v. Lloyd*, 1 *Salk.* 232. As to these, I am therefore of opinion, the joint-tenancy was severable by either of the joint-tenants, before the estate fell into possession; but, as to the other estates not comprised in the widow's jointure, the question arises, Whether she took an estate for life by implication? the devise over being *after her decease*, and to the *heir* jointly with another; for if she did, then the devise over was a *remain-*

der expectant on such estate for life; and, of course, the joint-tenancy was capable of being severed during the continuance of the particular estate. But if no estate was raised, by implication, to the widow, in the lands not comprised in her jointure, and the limitation over to the devisees was not a present interest, taking effect immediately in those lands, but future and executory; in that case, I apprehend, the joint-tenancy was not capable of a legal severance by any conveyance of one of the parties, before the estate commenced, as neither party could make any conveyance of such future estate, to take effect by way of *passing an interest*, but only by estoppel, against himself and his heirs.

Now, I rather think, the general doctrine, that a devise of lands to the heir, after the decease of the wife, or other person, operates to give such widow or person an estate for life by implication, extends to this case; the devise over, after the decease of the wife, being to the *heir*, and therefore importing the testator's intent, that he should not take before. It is true, as the widow, in this case, had an estate for life under the settlement, in *some of the lands*, the words *after her decease* may be contended to relate only to *those lands*; but, under that construction, I think, we must let the devise of the rest of the lands in immediately, instead of postponing it to the wife's decease; for the devise expressly comprehends

comprehends all the lands, whether in settlement or not; and if we restrain the words, *after the decease of my wife*, to those in settlement, there is nothing to prevent the devise to the rest being *immediate*; and this would remove the supposed obstacle to the severance of the joint-tenancy during the widow's life.

This is not like the case of *Cooke and Gerrard*, 1 Lev. 212., where there were *two periods expressed* for the commencement of the devise, respectively, answering to the *several determinations* of the preceding *subsisting and devised estates*; nor to that of *Sympson v. Hornsby*, Prec. Chanc. 439. 452., where there was an *express devise of part* of the testator's estates to the *widow for her life*, for her jointure, and *in full of all claims and demands whatsoever*; and, in *both* of which cases the lands, to which the implication was not held to extend, were adjudged to *pass immediately* under the *subsequent* devise. And the devise here, to the *heir jointly* with his brother, after the wife's decease, seems to corroborate the construction of *her* being entitled for life by implication, as the testator could scarcely mean the one should take during the widow's life solely, and then a *new estate*, in the same lands, arise to him and his brother in *joint-tenancy*; and the limiting the unsettled estates in X. to his issue in fee, in case he should have any, and not limiting them to his *brothers till after his wife's decease*, in case he

should have no such issue, I think, strengthens the construction of his intending them to his wife, for life, in the latter event. I therefore rather think, that under the devise above stated, an estate for life was implied to the widow, in the lands not comprised in the settlement, and, of consequence, that the devise over, after her decease, was a remainder expectant thereon, in which the joint-tenancy was severable by a conveyance, by either of the joint-tenants, of their interest therein.

UPON the validity of a separate lease,
at a rent *pro rata* of part of lands usually
let at a certain rent, under the
statute 32 Hen. VIII. cap. 28.

I AM not apprised of any case wherein the question, whether a bishop, or any spiritual person, may make a *separate lease*, at a rent *pro rata*, of part of lands usually let at a certain rent, has been decided. The books differ in respect to the point. In Lord Mountjoy's case, 5 Co. Rep. 3., the Chief Justice appears to have denied it; vide 5 Co. 5. b. But, in Co. Litt. 44. b. it is said, such a lease is good; for that it is in substance the accustomable rent; and vide also 3 Keble, 379, 380., and in Bacon's Abridgment, fol. 3. 365., under the head of Leases, which is generally ascribed to Chief Baron Gilbert. It is said, that the better opinion seems to allow of such leases, because it is in effect the ancient rent; and I must confess, that the arguments used against joining, in one lease, at

the combined rent, or more, two farms usually let separately, *viz.* That it is a kind of seigniority or prerogative to have several tenants; and that if the tenant proves insolvent, the loss, being of the whole, is greater upon the successor; seems to me to operate equally, on the other hand, in favour of distinct leases of farms usually letten together, reserving rent *pro rata*, amounting together to the whole former rent. But, as I do not know that this point has been determined, I cannot take upon me to say, that the validity of the leases now proposed will not be liable to dispute by the successor; and this uncertainty seems to be a ground of objection to *A.*'s executors joining in the surrender of the old lease, or extinguishing the security they now hold under that lease, without at least being properly indemnified by some other fund or security, not involved in the same question. If the lease is to be surrendered, and new leases taken, as proposed, I conceive, that the mayor's trustee of the ninety-nine years term, derived out of the subsisting lease, should either previously surrender that term to the mayor, in order to merge and extinguish it, or else should join in the surrender.

UPON legacies being vested or not;
and that the legacy given to *B.*
and *D.*, by the following will, is
vested.

A., by will, gave to *B.* and *D.*, their executors
and administrators, 3000*l.*, in trust, to pay
the interest thereof to his sister during her
life; and, after her death, to pay and assign
the same amongst all and every the child or
children of his sister, at twenty-one, or
marriage; and in case his said sister should
not have any issue living at the time of
her death, then and in such case he be-
queathed the said 3000*l.* to the said *B.*
and to *D.*, for their own use, to be equally
divided between them. The sister re-
ceived the interest for her life, then died
without leaving any issue. *D.* died before
her.

AFTER

AFTER a serious attention to the circumstances of the above stated case, and the principles which seem to me applicable to the decisions of questions of this nature, I cannot help considering the interests of the said *B.* and *D.*, in their respective moieties of the 3000*l.*, as executory bequests thereof, transmissible to their respective personal representatives, upon the decease of the testator's sister without issue then living. But, at the same time, I must confess, that my respect for the opinion of Mr. ———, occasions me to distrust the grounds on which my opinion proceeds, whenever I find it differs from his sentiments on the same case, which, of course, induces me to enter into some explanation of the reasons and distinctions by which I think myself bound on such an occasion.

There is, indeed, a variety of decisions in respect to the question of legacies being vested or not, arising upon different circumstances peculiar to the several cases; and some of these decisions seem to be so little reconcilable

to others, (perhaps from some inaccuracy in the reports of cases,) as to afford sufficient ground to consider such questions in general as very doubtful, and resting too much in the breast of the Court. However, the general tenor of the decisions on this point appear to me to furnish the following general distinctions :

First, That where legacies are charged on lands, and made payable at a future day or time, in case of the death of the legatee before that day or time arrives, the legacy will generally lapse, so far as respects the charge on the real estate, whether the gift and time of payment were both future, or whether the gift founded in the present tense, and the time of payment only in the future. I say generally, because there are exceptions to this rule which it is useless to enter into in this place.

Secondly, That where a bequest is absolute of, or out of personal estate, to be paid at a future time, there the death of the legatee before the time of payment will not occasion the legacy to be lapsed, it being considered a *debitum in presenti, solvendum in futuro* ; but if the gift is originally annexed to the time of payment, so that both are clearly future, there the death of the legatee before the time
or

or day of payment will occasion the legacy to lapse.

Thirdly, That the last mentioned rule is to be understood in respect to those cases, where such future bequest is the first disposition made of the money or thing which is the subject of such future bequest, and where no prior, intermediate, or eventual disposition is made of such money, or other thing, or the produce thereof, which necessarily postpones the effect of the further and subsequent disposition of such money or thing itself, to the period or determination of such prior or intermediate interest therein, when such subsequent disposition is to take effect. Under this distinction, which, I think, is well warranted by many cases, the entering into which would lead me rather into a treatise than an opinion on the point, I think, that an original bequest of 100*l.* to *B.*, after the decease of *A.*, would lapse by *B.*'s death in *A.*'s lifetime; but that a bequest of 100*l.*, in trust, to pay the interest thereof to *A.* during his lifetime, and, after his decease, to pay the principal to *B.*, would be an executory bequest to *B.*, which would be transmissible to his executors, and vest in them upon the decease of *A.*, though *B.* died in his lifetime; and if the bequest, instead of being made to take effect on *A.*'s decease, was made to depend on the event of his dying without leaving

leaving issue then living, I. do not see what difference that contingency would occasion, as it is a general rule, that executory contingent devises or bequests are transmissible to the real or personal representatives of the devisees or legatees respectively, according to the nature of the estate, (upon the contingency's taking effect,) though such devisees or legatees die before the contingency happens.

There may be, and indeed have been, cases, where the disposition of a sum of money, or other thing, after a particular interest or estate for life, cannot be considered, in any degree, a transmissible interest, which happens whenever the objects of future dispositions must, from the nature of the disposition itself, be persons living at the time when such future disposition is directed to take effect, as in the case of *Thickness v. Liege* before the House of Lords in 1775, which, so far as is material to the present point, was a bequest of the residue of the testator's personal estate, after his daughter's death, amongst her issue; and if his daughter should happen to die without any child, then to the other persons therein named. And it was held, that nothing became vested and transmissible in a child dying in the mother's lifetime. The ground of which decision appears to have been, that as the testator's daughter

daughter had a child born and living at the time when the testator made his will, he could not mean, by his daughter's dying without any child, dying without ever having any child; but must mean, without any child living at her decease; and, consequently, on her death without leaving a child, the subsequent limitation took effect, and then it was impossible for any thing to vest in a child not surviving her.

Upon the whole, a comparative view of the cases upon this head seems to me to afford ground for a conclusion, that where a personal legacy is, in the first place, given to a person during a particular period, or on a particular event; and after such period, or on the failure of such event, then to another person *in esse*, and ascertainable at any time previous to such period or event, (such period or event, in its nature, falling within the limits allowed to executory limitations,) the subsequent bequest so far attaches in the ulterior legatee, as to be transmissible to his or her representatives, upon the determination of the period, or failure of the event mentioned.

This conclusion, I think, is warranted by the decision in the cases of *Pinbury v. Elkin*, 1 P. Wms. 563., and in the case in 2 Ventr. cited *ibid.* 566.; *Chauncy v. Graydon*, 2 Atk. 616.

Peck

Peck v. Parrot, 1 *Vez.* 236.; *Exel v. Wallace*, 2 *Vez.* 118. 318.; and the case of *King v. Withers*, *Cas. temp. Talb.* 117., afterwards affirmed in the House of Lords; which last case is the stronger, as it was a charge on the real estate. I therefore incline to the opinion, that the personal representatives of *D.* are entitled to one moiety of the 3000*l.* in question.

THAT

THAT a bequest takes effect, notwithstanding the explained final cause, or assigned intention of it, never existed; and that parol testimony might be admitted, to shew the mistake.

A., by will, bequeathed to *C.* the sum of 300*l.*, to enable the said *C.* to discharge a debt due from him to the testator *A.*

No debt was due from *C.* to *A.*

THE bequest of 300*l.* to *C.*, if we take it as it stands in the will, under the explanation of the subsequent words, *to enable, &c.* would be fruitless and nugatory, as the final cause, or assigned intention of it, never existed. Therefore, to give it any effect at all, we must reject this explanation as incongruous, or founded in a mistake; and supposing the parol testimony of *D.* to be admissible

to shew such mistake, all difficulty is removed.

Whether such testimony may be admitted or not, seems a question. The disposition, indeed, is a personal legacy. The parol testimony tends neither to vary the object or subject of the disposition, but only to account for the insertion of certain words, which, upon the very face of the will, as referred to, are evidently absurd, and contrary to any possible intention of the testator. I therefore rather incline to the opinion, that such parol testimony might be admitted in this case; though I think parol evidence absolutely inadmissible, where it has any degree of tendency to alter any disposition, even of personals, in regard to the object or subject of the disposition, as expressed by the words of the will itself; or to impose an intention contrary to, or different from, what the words of the disposition naturally and consistently import. But I am far from clear as to the necessity of resorting to any parol testimony as to the testator's intent to support the legacy in question; for here is 300*l.* given by him to C.; it is expressed to be, to enable him to discharge a debt to the testator; no such debt ever existed; had it existed, the intent was to forgive him so much, which was in effect a gift of 300*l.* to him. The intent of the testator,

tor, therefore, even under the subjoined words, which create the difficulty, is manifest, to give C. 300 l.; and then should the objection be stated, that by the subjoined words he meant only to give him such 300 l. in part of a debt then due from him to the testator, and to confine the gift to the event or circumstance of his being so indebted, the answer is, that such intent was impossible, as no such debt was ever due from C. to the testator.

But suppose it had been a gift to C., on condition that he thereout or thereby paid 300 l. of the debt due from him to the testator; in this case, I conceive, that the condition being impossible, as the debt never existed, the gift would have been absolute; and, therefore, upon the whole, I incline to the opinion, that C. became entitled to the 300 l. in the present case; and that his widow, as his acting executrix, is the person entitled thereto, and capable, as such, of giving a legal discharge for the same. Indeed, had this been a legacy to a person expressly for a purpose, the benefit whereof did not wholly and solely vest and terminate in himself, the case would have been widely different; and the end of the legacy failing, would have been a reason for considering the legacy itself as void in event. But here the legacy, even as explained by the subsequent words in question, was for the sole benefit

benefit of C. But the explanatory words evidently involve a mistake, in respect to the particular mode of the supposed or intended application for his benefit, still leaving the general intent of such a legacy for his benefit uncontradicted.

THAT the following limitation in a will may possibly be considered as giving an estate tail.

X., by will, devised all his messuages and real estate unto his wife, and her assigns, for her life; and, after her decease, he gave the same unto his nephew B., his heirs and assigns, for ever; but, in such will, says, " Provided nevertheless, and in case
" my said nephew B. shall happen to die
" or depart this life without leaving any
" issue of his body lawfully begotten,
" then, from and immediately after the
" decease of the survivor of them, my
" said wife, and my said nephew B., I
" give and devise the same messuages and
" real estate unto my next heir male, and
" unto the heirs and assigns of such heir
" male, for ever."

B. was the testator's heir at law.

THE doubt, in this case, seems founded on the word *assigns*, added to *heirs*, in the first devise to the nephew; and the words, “*without leaving issue*,” and, “*from and immediately after the decease of the survivor of the wife and nephew*,” in the proviso or limitation over.

As to the first word, *assigns*, I apprehend, it is of little moment, as being, in effect, included in the limitation to the *heirs*, which, without the word *assigns*, would equally have imported the same estate, *viz.* a *fee simple*, which could not be extended by the word *assigns*; and, as to the other words, they indeed seem to point *at the time of the decease*, and to imply, that the testator meant, in case of his nephew's dying without leaving any issue *living at the time of his decease*; and, I conceive, that would be the construction upon them, in respect to limitations *of personal estate*; because there every circumstance or expression that can serve to confine the limitation over to default of issue *living at the time of the decease*

cease of the legatee, on whose death without issue the ulterior limitation depends, is allowed its full effect, *ut res magis valeat quam pereat*; that is, to prevent the limitations over from being void, as they would be without such construction. The admitting such an implication there, is requisite to give the subsequent limitations any effect at all; but the like call for such an implication does not exist in respect to *real estates*, where the devise may take effect as a remainder expectant on an estate tail. The words, *die without leaving issue*, qualifying the import of the first limitation, and reducing it to an estate tail; and therefore, although we frequently find such an implied restriction allowed, in the cases of personal estates, yet I do not recollect a similar adoption of it, in regard to *real estates*. So far from it, we find, that in the case of *Forth v. Chapman*, the like expression, viz. *Depart this life, and leave no issue*, was held to relate to the time of the parent's death as to the leasehold, but to import a general failure of issue as to the freehold lands comprised in the very same limitation. (Vide 1 P. Wms. 667, 3 Atk. 398.)

If the limitation over here had been, without leaving any issue *then living*, that indeed would have been an express executory devise, restrained to the failure of issue *at the death of the nephew*. As it now stands, the question seems to rest upon

upon the implication, from the words I have above noticed; and I am not aware of any case where an executory devise has been admitted *by implication*, however strong, if the limitation could take effect *as a remainder*. On the contrary, our Courts have even raised an *estate tail by implication*, in a person to whom there was *no preceding devise of any estate at all*, in order that a limitation, not much unlike the present, might take effect *as a remainder*, upon such estate tail, instead of an executory devise.

Thus, in the case of *Walter v. Drew, Com. Rep. 372.*, where the testator declared his will, that if his son *William* should happen to die, *and leave no issue of his body lawfully begotten*, that then, *and in such case, and not otherwise, after the death of his said son*, he gave and bequeathed all his lands of inheritance in *L.* unto *R.* his son, to have and to hold the same, *after the death of the said William*, to him and his heirs. It was contended, that the limitation to *R.* was an *executory devise*, to take effect on the death of *William* without issue living *at the time of his decease*; the words *if he die and leave no issue*, being tantamount to *leaving no issue at the time of his death*; and the gift to *R.*, *after the death of William*, expressing the testator's intent, that *R.* should have the lands *immediately upon the death of William*. But the Court decided, that *William*, who was heir of the testa-

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tor,

tor, took *an estate in tail* by the will by *implication*; because words shall not be construed to give an executory devise, but where the devise cannot take effect in any other way. And the same principle was pursued by Lord *Hardwicke*, in the case of *Wealthy v. Bosville*, Rep. K. B. temp. *Hardwicke*, 258., and is well established by many other cases,

Indeed, the case of *Walter v. Drew* seems to be nearly the present case in specie; for here the first devise *to the heir at law in fee*, was in effect a nullity, which reduces the devise to him to the mere operation of the limitation over on his dying without leaving any issue of his body lawfully begotten; which words, *without leaving any issue*, are equivalent to the words, *and leave no issue*, &c. in *Walter and Drew*. And the words, in that case, as well in the *immediate limitation*, as in the *habendum*, AFTER THE DEATH OF THE SAID WILLIAM, seem tantamount to the words, *from and immediately after the decease*, &c. in this case. And I see no distinction between the two cases, that appears to me of essential weight, when in the opposite scale to that generally prevailing rule, that a limitation shall never operate as an executory devise, if it can take effect as a remainder.

That the word assigns, subjoined to the word *heirs*, does not prevent the construction of an estate

estate tail, upon the limitation over in default of issue; vide 3 *Leon*, 5., *Canon's case*. Upon the whole, therefore, I incline to the opinion, that the nephew took an estate tail under the above devise, considering it, in effect, as a limitation to *him and his heirs*; and, in case of his dying *without issue*, then over; and, consequently, that by being vouched in a recovery against a proper tenant to the præcipe, (for making which the testator's widow of course *must* concur,) he may bar his estate tail and remainder over, and acquire the fee simple, subject to the widow's estate for life, which may either be preserved, or may be re-limited to her, under the uses of the recovery.

I have expressed the light in which the case strikes me; but I would not be understood to consider it as clear of question, which is the reason for my entering so far into the grounds of my opinion. I have indeed known some difference of opinion on a nearly similar limitation so that on which the present question arises.

THAT

THAT the following perplexed limitations in a will may possibly be construed to give an estate tail.

A., by will, says, " My estates called *X.* I devise unto my brother *A. B.*, for and during the term of his natural life; and, from and after his decease, I devise the same to the *heirs* male of his body lawfully to be begotten, when such *heir* male attains his age of twenty-one years; but in case my said brother *A. B.* should die without any heir male, or dying with such heir male, such heir male should die before he attains his age of twenty-one years, and without heir male of his body lawfully to be begotten, then and in such case I devise my said estates to my brother *C. D.*, for and during the term of his life," with divers remainders over.

IF the testator had studied to puzzle the law, and had actually availed himself of the ablest ingenuity for the purpose of putting the operation of his will out of the reach of any legal construction, I think he could not have done it more effectually than by the devise above stated.

The limiting the estate to the heirs male of his brother, after an express estate for life to him, and then restraining the effect of such limitation to an *heir male upon his attaining the age of twenty-one years*, is a perplexity, from which I am not aware of any decided case, or known rule, to extricate the interpretation of this will. Had the words, *when such heir male attains his age of twenty-one years*, been out of the case, I should have made little difficulty in delivering my opinion, that *A. B.* took an *estate tail* from the union of the limitation, to the heirs male of his body, with his preceding estate for life; for the subsequent limitation, in case the *testator's brother A. B.* should die without any heir male, or dying with such heir male, such heir male should

shou'd die before he attains the age of twenty-one, and without heir male of his body lawfully begotten, is really a limitation over, only in an event which would be a *regular determination* of such estate tail, and therefore by no means inconsistent with the construction of an estate tail; and were it otherwise, and such subsequent limitation enured to abridge or defeat the estate tail imported in the preceding devise, yet it would not prevent the estate tail's vesting, subject to such limitation over, which would be barrable by a common recovery of the tenant in tail.

But the making the devise to the heirs male depend on an heir male attaining twenty-one, is inconsistent with an estate tail in the ancestor; for, under that, the heirs male would take *immediately on the decease of the ancestor*; therefore, if this suspended limitation is to prevail, I think *A. B.* cannot be considered as taking an estate tail.

But the nature of this limitation is such, that, however it contradicts the construction which would otherwise arise from the preceding limitation, it is no less inconsistent with the nature of the subsequent limitations; and the intent of the testator is apparent, - as well in those subsequent limitations, as in the whole devise taken together. From the whole devise, it is manifest, that the testator meant his brother

ther *A.*'s heirs male should take, so long as there existed any; and that the estate should not go over to his brother *C. D.*, till *failure of heirs male* of his brother *A.*; for the estate is first given to the *heirs male of A. B.*, and is not given over unless his brother *A.* should die *without any heir male*; or, if he left heir male, unless such heir male should die under twenty-one, *without heir male of his body*; by which the intent of the testator is express, that if *A. B.* died leaving heir male of his body that should die under twenty-one, leaving heir male of his body, the estate should not go over; consequently he did not mean that the death of an heir male of *A. B.* *under twenty-one*, should prevent the heir male of the body of such heir male from taking the estate. But yet such last heir male could not take; if the devise to the heirs male of *A. B.* was not to vest but in one attaining the age of twenty-one; for such heir *dying under twenty-one* could not transmit it to his issue in that case, nor could his issue male possibly take but through him: Therefore these two intentions of the testator are incompatible, *viz.* That the limitation to the heirs male of *A. B.* should be confined to an heir male attaining twenty-one, and that the estate should go to the heir male of the body of such heir male *dying under twenty-one*; so that one must be given up or rejected in the construction, and the latter intent,

intent, as being part of the general intention, apparent both in the first and latter part of the devise, is what I incline to prefer.

If that is admitted to prevail, then the words, *when such heir male attains twenty-one years of age*, must be rejected, or at least be construed to import, no more than *the time at which he intended such heir male should be entitled to the actual possession and management of the estate*; and, in that view of the case, the devise rests upon the operation of the preceding and subsequent limitations, which, upon the principle above noticed, I should consider as giving an estate tail to *A. B.* Perhaps the words I have supposed to be rejected, might, however inoperative for confining the devise to an heir male attaining twenty-one, still be contended to afford an argument of the testator's intent, that the preceding words, *heirs male*, &c. should not operate as words of limitation, but as words of purchase, to give an estate tail to such heirs male, and not vest it in the ancestor. But even then, as I think several of the cases in which those words have been held to operate as words of limitation, under the force of the general rule, contain at least as strong expressions of a contrary intention in the testator, I think this resort would not be sufficient to prevent the construction of an estate tail in *A. B.*

Upon the whole, I scarcely know how to deliver an opinion on this case, as it appears so very doubtful and difficult of construction. But, as I am called upon for my sentiments respecting it, I choose to incline to the construction of an estate tail in *A. B.*, for the reasons I have mentioned.

UPON the construction of contingent limitations in a will. See 2 *Durnford and East*, 209.

THE above case, I find, was laid before me some time since by another Gentleman; and the case then containing only a short extract of Mrs. *Mary W.*'s will, and noticing, that it recited the settlement, and that she, by virtue of a power, appointed the trustees to pay 1000*l.* unto her son-in-law *A. W.*, upon the contingency therein mentioned, (and not stating what contingency); and that in case neither *J. W.*, nor any issue of his body, should be living at the decease of the testatrix, *by which event the settled estates would devolve upon her and her heirs, then she devised the same estates, &c.* I rather inclined to the opinion, though very dubiously, that the devise might be construed as intended to take effect upon the estate's devolving on her or her heirs; that is, falling into possession, at least as to the limitations of
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of the freehold; and that she only referred to the decease of *J. W.* without issue in her lifetime, as supposing it to be the only event in which she could dispose of the lands. But, upon perusing the above state of her will at large, I am of opinion, that no part of the devise of the lands took effect in the event that has happened; for I now find she had expressly in contemplation the two distinct events, *viz.* That of *J. W.*, or any of his issue, being living at her decease, and the alternative thereto, of *neither him nor any of his issue being* then living; and that she distinguishes between them, and makes different provisions for them, exercising her power of appointing the 1000*l.* in the one case, and that of appointing the *lands* in the other. It therefore appears to me, that the appointment of the *lands* is to be considered as dependent on the event of neither *J. W.*, nor any of his issue, being living at the testatrix's decease; and that it has failed by means of *J. W.*'s being then living; and, consequently, I conceive, that the fee descended on the testatrix's daughter, and from her must descend to her heir at law, *ex parte maternâ*, as the lands descended from her mother, who purchased the reversion under the settlement recited in her will, which fell into possession to the daughter; and that neither the heir at law of *A. W.*, nor the heir

at law of Miss *W.*, on the part of her father, can, as such, have any title thereto.

And I think, in the event that has happened, of *J. W.* being living at the testatrix's decease, the appointment made by her, of the 1000*l.* to be raised under the trusts of the term of 500 years created by the settlement, has taken effect, and that the personal representatives of *A. W.* are entitled thereto, upon securing and paying the annuities and legacies directed by the testatrix to be secured and paid by *A. W.* out of the said sum of 1000*l.*; to which annuities and sums of money, I conceive, the annuitants and legatees thereof are in equity entitled; the annuitants to the annuities, from the time directed by the testatrix, and the legatees to their legacies of 50*l.* from the end of six months after her decease, at 5*l. per cent.*, the principal being directed to be secured by *A. W.* with bond, which, I apprehend, would carry that interest; otherwise, as charged on lands, they must have carried only 4*l. per cent.*

But as to the legacies directed to be paid to *J. V.*, *S. R.*'s children, *E. G.*, *A. H.*, and *M. V.*, under the trusts of the term of 500 years limited to *H. L.* and *M. D.* by the will, as well as the legacies directed by the will and codicil to be secured by *A. W.* or his heirs,

heirs, on his or their coming into possession of the estates devised to him; all those, I conceive, have failed, as that devise or appointment from which they were to arise has failed, by J. W.'s being living at the testatrix's decease.

FURTHER Observations upon the same limitations.

THE very respectable opinions of Mr. ——— and Mr. ——— would fully justify me in altering my former opinion, if the words and connections of the dispositions in the will did not appear to me too strong to bend to the constructions which those Gentlemen incline to.

The testatrix first makes an express appointment of the 1000*l.* under the power in the settlement, in the event of *W.*, or any issue of his body, *being living at the time of her decease.* She then takes up the *alternative* event of *neither J. W., nor any of his issue, being living at her decease*; in which event she expressly considers the estate as coming to her, and therefore thought she might dispose of it, which she seems not to have had any notion of in the other case; and she accordingly,
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in the latter event, devises and creates a term of 500 years for raising the like sum as she had appointed in the other event, for the same purpose, and also for raising a further sum of 1000*l.* for the purposes therein expressed.

Now, I think it as clear as language can make it, that this last term of 500 years was only to take effect in case of neither *J. W.*, nor any of his issue, being living at the time of her decease. When a testatrix says, if such a person, &c. shall be living at her decease, she directs and appoints so and so; and in case such a person *shall not be then living*, then she gives and devises so and so; is it possible to consider the *latter* disposition as extending to the first event? Could we even suppose the testatrix to have intended it, her words do not leave any opening for *construction* on a *supposed intention*, but positively and clearly speak the contrary. So far, therefore, as respects the term of 500 years devised by the testatrix to the trustees, in the event of neither *J. W.*, nor any issue of his body, being living at the time of the testatrix's decease, I see no room for considering it as having taken effect, nor, consequently, for concluding, that any of the trusts under it have arisen, or can be construed to exist. I think it cannot be denied,

that the appointment of the 1000*l.* under the subsisting term has taken effect, the event on which it was limited having happened. I also think it clear, that *both* the dispositions, *viz.* that made in the event of *J. W.*, or any of his issue, being living, and that depending on the event of neither his, or any of his issue, being living, could not take effect. The event on which the first was expressly limited *has happened*; that on which the other was limited *has failed*. Under these circumstances, it would be strange, I think, to reverse the express effect of the will, and consider the first as having failed, and the latter as taking place; and yet, without such a construction, I do not see how the further sum of 1000*l.*, directed to be raised under the last mentioned term, can be held to have taken place.

But the principal doubt arises upon the subsequent limitation of the freehold and inheritance, whether that depends on the same condition or contingency as the devise of the term of 500 years. Now considering, that this is a continuance of the remainder upon the disposition taken up by the testatrix, in the event of *J. W.*, or any of his issue, not having been living at the time of her decease, and that this is expressly *from and after the expiration, or other sooner determination, of the*
said

said term, and subject thereto, it appears to me, that it was a contingency of the same contemplation and intention of disposing of the remainder or reversion of the lands, in the event in which the term itself was devised. As it was *made from and after the term, and subject thereto*, it clearly supposed the term itself to exist prior to it; but the existence of the term, as I have before observed, was confined to the event of neither J. W., nor any issue of his body, being living at the time of the testatrix's decease. The disposition, therefore, that presupposed, and was to be subject to the term, I conceive, must be considered as depending on the same contingency as the term itself.

For this reason, I cannot help considering the estate devised to the mother, being expressly made *from and after*, as dependent on the same event as the term. The subsequent limitation to the daughter is clearly a continuance of the same devise, and a disposition merely of the remainder undisposed of in the limitation to the mother. To consider it otherwise, would be to suppose the testatrix intended the daughter should eventually take the estate during the mother's life; which, I apprehend, she had no intention she should; and also, that the daughter should, in the event

of J. W., or any of his issue, being living, take the estate clear of the term of 500 years devised by her, and after the ultimate charge of 1000*l.* under the trusts of the term. This will, I apprehend, be the consequence, if we suppose the devise to the daughter not to be confined to the same event as the devise of the term. For these reasons, I incline to think the devise to the daughter must be, agreeable to the import of the words, confined to the same event as the devise of the term; that is, of neither J. W., nor any of his issue, being living at the time of the testatrix's decease.

The executory limitation over to A. W., in the event of the daughter's dying under twenty-one, was manifestly only a *substitutionary* disposition for that before made to the daughter herself, and, consequently, dependent on the same event. He was only to take what was intended absolutely to vest in the daughter under the *devise*, if she had lived to attain twenty-one. The devise to her was made defeasible on the event of her dying under twenty-one, and A. W. put in her place, in respect to *such devise*; and therefore I conceive the devise to him is to be considered as dependent on the same primary condition as that to her, as it was, in all events, I think, intended she should take under the
devise

devise before him. To construe it otherwise, would be to suppose, that the testatrix intended, that, in the event of neither J. W., nor any of his issue, being living at her decease, and of the daughter's dying under twenty-one, A. W. should take the estate clear of the term of 500 years devised by the testatrix, and the ultimate charge of 1000*l.* under that term, which, I think, cannot easily be admitted.

The truth seems to be, that the testatrix had no notion of her power of disposing of the estate, in the event of J. W., or any of his issue, being living at the time of her decease; and therefore had no intention of, nor has made any disposition in that event, than the appointment under the subsisting term of 500 years; and the question, I take it, is not what we must suppose she would have intended and done if otherwise informed, but what she has done under her apparent state of information; and as to her specifying in her codicil the devise to A. W. in terms expressive of *one* contingency only; it seems natural and proper enough, as the devise was not on two several and unconnected contingencies, so as to depend on each of them separately, but was ultimately dependent on one *final contingency*, resulting from the combination of two events; the concurrence of which two events constituted that one contingency referred to.

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I therefore, upon the whole, cannot (though with much diffidence and reluctance, on account of the truly respectable opinions, that, I am sorry to find, are to the contrary) help still inclining to the opinion I have already delivered on the above case.

THAT

THAT the following executory limitations by a deed, to the first son of *D.* who should attain twenty-five years of age, is void; and that other limitations, subsequent thereto, may probably be deemed void also.

A., by indenture of lease and release, conveyed lands to trustees—To the use of *A.* for life, and, after his decease, to the use of trustees, their heirs and assigns, upon trust, that they, and the survivors and survivor of them, and his heirs, should, amongst other things, raise and apply, out of the rents and profits of the said hereditaments, for the maintenance of *D.* during his life, such sum as they thought proper, not exceeding — *l.* a-year; and should also, out of the same rents and profits, raise money for the education of all or any sons of the said *D.* lawfully begotten, until some son of the said *D.* should attain his age of twenty-five years, at such times, and in such manner, as the said trustees should think

think fit, not exceeding the sum of — *l.* for an eldest, and the sum of — *l.* yearly for a younger son or sons; and to pay the residue of the rents and profits of the said hereditaments towards discharging the incumbrances thereupon, until such eldest son of *D.* should attain twenty-five years; and when such son of *D.* should attain twenty-five years, to convey the said hereditaments:

To the use of such first son attaining such age, and the heirs male of his body; and, for default of such issue, to the use of the second and every other son of the said *D.* in tail male; remainder to *E.*, younger brother of the said *D.*, for life; remainder to trustees, to preserve contingent remainders, with divers other remainders; and the ultimate remainder to *A.*'s right heirs.

The said *A.*, by will reciting the said indentures of lease and release, devised all his leasehold and copyhold lands to the said trustees, and the survivors and survivor of them, his executors, administrators, and assigns, subject to, and under the same trusts, uses, and limitations as the said estates were limited in such indentures.

A. died.

A. died. *D.* survived him, married, and had issue one son, *B.*, and died. *B.* has lately attained twenty-one years of age; and all the incumbrances on the lands are paid.

THE trust for the first son of *D.* attaining the age of twenty-five years, he having then no son born, seems to me to be a limitation which might eventually not take effect for twenty-five years after a life in being, at the creation of the trust. This exceeds the limits hitherto allowed for executory limitations on trusts; which sort of limitations is required to be confined to the period of *twenty-one years* after a life in being: therefore, as the preceding estate to *A.* for his life, did not endure to support it, supposing it to have been a contingent remainder, instead of an executory trust, arising out of a remainder, I do not see, unless we can consider this limitation as vesting in an eldest son, in *interest*, though not entitling him to the *possession* before that time, how it can be supported. But here is no express limitation of the estate to, or in trust for, an eldest or only son not first attaining the age of twenty-five. The limitation over to the second or other son or sons, indeed, is

not attended with such a restriction; but this subsequent limitation seems expressly confined to second and other sons, after failure or determination of the estate to the first son attaining twenty-one; and therefore, the difficulty is for *B.*, as being a first or only son, to support his claim under it.

Had it been a case of a *devise*, possibly the circumstances of the application of the residue of the rents, to the discharging incumbrances on the estates, till the first son attained twenty-five years of age, might have been urged as an argument for construing this procrastination of the trust for him, to amount to a mere suspension of his possession till that age; and that it should vest in interest in him in the mean time, subject to such charge; and this construction would have been aided by his having a maintenance out of the lands in the mean time.

But this being the case of a *deed*, I am afraid, is a circumstance that bears hard against such latitude of construction. It is true, indeed, this is a case of a *trust*, the legal estate passing to the trustees in remainder expectant on *A.*'s decease; which circumstance, added to the direction to apply a sufficient part of the rents and profits of the lands for the maintenance and education of the first son of *D.* attaining
twenty-

twenty-five years of age, till the time when the estate is directed to be conveyed to him, might possibly be urged as an argument for a court of equity to consider the limitation after *A.*'s decease, as amounting to a trust for the first son, subject to the charges imposed thereon, till the age of twenty-five, and suspending only his right of possession till that time. But, I am afraid, it would be too great a violence upon the express words of the trust, to consider a first or only son as entitled, before his age of twenty-five years, to an estate tail, under a direction, that when any such son should attain that age, the trustees should convey the lands to the use of such son first attaining such age, in tail, when there is no other direction or limitation in the will to entitle him to any estate at all in the land, but such direction to convey to such son first attaining such age of twenty-five years. I therefore rather incline to the opinion, that the limitation to the first son of *D.* cannot be supported, because too remote; and, consequently, that *B.* is not entitled under it, nor can do any thing to bar the subsequent limitations, supposing them good.

Now, as to these subsequent limitations, they were trusts, to arise out of the same legal remainder in fee in the trustees, as the preceding trust for the first son of *D.* attaining the age of twenty-five. But though the trust for such first son

son attaining that age was contingent, yet as the estate so intended for such son did not extend to the *whole* *see* *simple*, the subsequent trusts do not appear to me necessarily to be bound by, or depend on, the same contingency. I think they may be considered as trusts taking immediate effect in interest, or out of the legal estate in the trustees, subject to the preceding charges and the contingent estate to the first son of *D.* attaining the age of twenty-five; inasmuch, that if *D.* had died without issue, I do not see why they might not have taken effect; and if they may be considered as vested, subject to such intervening contingent limitation to the first son of *D.* attaining twenty-five years of age, supposing it good, and that intervention is found to be, or becomes, void, it seems to be as much out of the way as if it never had taken effect, and were determined; or as if it never had been limited at all; just as in the case of limitations in a conveyance at common law, where, if any intervening remainder is, or becomes, void, the subsequent remainder-man takes as if the first were out of the case.

It is true, when the *particular estate* is void, (except in a will,) the remainder fails too; but the limitation to the first son of *D.*, in the present case, is not in the nature of a *particular estate*, but of a remainder, it being to arise out of a remainder in the trustees, which was preceded

ceded by the *particular estate* in *A.*, and became vested thereon. Possibly it may be urged against the validity of these subsequent limitations, that if the limitation to the first son of *D.* is void, the subsequent limitations stand as estates, to take effect on the *failure of issue male of D.*, without any subsisting estate to endure till that period; and, under this view, they would certainly be too remote. But I see no necessity for considering them in such a light, any more than in the case of a lapsed devise of the particular estate, or of a void remainder in a conveyance at common law, where the words introducing the subsequent remainder, upon the determination of the first estate or remainder, are not considered as postponing the subsequent remainder to the period when such first estate, or preceding remainder, would have endured, if they had taken effect; but the estate being *void*, its extent or duration vanishes of course; and, of consequence, the words of reference to such extent or duration, having no object to relate to, cease to be of any effect, and the next remainder is let in immediately, without any regard thereto. And therefore, in the present case, in order to support the deed, so far as it is capable of any construction in its favour, I incline to think the subsequent limitations may be maintained, upon the grounds I have noticed.

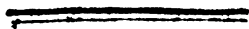
mitations five years longer than what has yet been allowed, which seems to have been one of the grounds upon which, in the case of *Lade v. Holford*, 1 *Black. Rep.* 428., a proviso in a will to suspend the possession of an unborn tenant in tail, till the age of twenty-six years, was held void.

But, in regard to the validity of the subsequent limitations, though my former opinion rather inclines in favour of them, yet the more I consider the case, the more difficult I find it to retain that opinion, or indeed to form any opinion upon that point. Indeed, I think it may be solidly contended, that none of the subsequent limitations could be construed to vest, before the time limited for the preceding limitations to the eldest son of *D.*; the consequence of which is, that if the former fails, as too remote, the latter do so likewise. To consider the latter limitations as vested before the former, would, I conceive, be to exclude the former entirely, on the event which has happened, of its incapacity to take effect at the decease of *A.*, first tenant for life, and so let in the remainder men to the estate before the commencement of the trust, under which their claim and title was originally to arise.

As to the latter part of the query, respecting the bar of the remainders by fine, supposing them
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them good, I conceive, that supposing *B.* to be now in the possession and enjoyment of the estates, that if he executes a deed of feoffment of the freehold lands of inheritance, duly executed with livery of seisin, and afterwards levies a fine *come ceo*, &c. thereof, with proclamations, the subsisting remainder men (*i. e.* the sons of *D.*, nephews of *A.*, and their issue) will be barred by five years non-claim, if not under any of the legal incapacities to claim mentioned in the statute.

As to the leaseholds or copyholds, a fine is not applicable to them; nor do I know of any other similar mode of effectuating a bar as to them.



THAT a limitation, unsupported by a trust, is too remote, if not confined to the failure or determination of the preceding estates, but made to depend on an event collateral thereto, unless such event happen by the time all the preceding estates determine; and that the same doctrine holds as well in copyholds as freeholds.

A. B. having purchased a copyhold estate, was, on the surrender of *X.*, admitted thereto, in the following words :

“ —Præfato *A. B.* pro et durante termino vitæ;
 “ et, post ejus decessum, *Mariæ* uxori præfati
 “ *A. B.* pro termino vitæ; et, post de-
 “ cessum præfatorum *A. B.* et *M. B.*, et
 “ diutius viventis tunc seniori exitui masculino
 “ de corporibus dictorum *A. B.* et *Maria*,
 “ legitimé procreato vel procreando; et, pro
 “ defectu ullius exitûs masculi de corpori-
 “ bus prædictis, tunc exitui feminino de
 “ corporibus prædictorum *A.* et *M.*; et,
 “ pro defectu talis exitûs, tunc rectis hære-
 “ dibus præfati *A. B.* in perpetuum.”

After

After the decease of *A. B.* and *M.* his wife, *D.* the eldest son was admitted, to him and the heirs of his body, and immediately suffered a recovery, and was admitted in fee. The custom of the manor gives to the youngest son.

THIS case, I think, involves no inconsiderable difficulty. That limitations upon surrenders of copyholds are to be construed as in conveyances of freehold estates, I think, is a point not now to be questioned; vide *Seagood v. Hone*, *Cro. Car.* 366.; *Allen v. Pasball*, *Godb.* 137.; and *1. P. Wms.* 75. 77. And therefore, I conceive, that the limitations, *seniori exitui masculino*, could give no more than an estate for life to the eldest son, without extending to any younger son. This point, indeed, seems to have been decided, even in the case of a devise; vide *Lovelace v. Lovelace*, *Cro. Eliz.* 40. *Andersf.* 132. And, I apprehend, that the limitation to the issue female, being in default of any issue male, must have failed, as there was such issue male; and, in any event, I think, could have given no more than an estate for life to such issue female; and therefore, if the remainder limited to the

right heirs of A. B. were clearly good, under the above circumstances, I should conceive, that as it vested in him, according to the rule in *Shelley's* case, by union with his preceding estate for life, it descended to his heir according to the custom, which was C. his *youngest son*; and through him, by representation to his son; vide *Clements v. Scudamore*, 1 *Salk.* 243. 1 *P. Wms.* 63.; and, consequently, that the son of C. would now be entitled to such remainder in fee, expectant on the estate *for life in his uncle D.* And, if so, I think he might, by a bill in equity, restrain D. from cutting timber. And the *recovery* being suffered in the lord's court; I think, would be no forfeiture of which the person in remainder or reversion could take advantage, as in the case of a recovery suffered by a tenant for life of the freehold lands; for in copyholds, the *legal freehold* estate is in the lord himself; vide *Keen v. Kirby*, 1 *Mod.* 199. 2 *Mod.* 33.

But the difficulty is, how the limitation in the surrender to the right heirs of A. B. is to be supported, being after a failure of *any male issue* of the bodies of him and his wife, without a preceding limitation *extended to that period*; for if it depended on a default of *any issue male*; that is, on the event of there being *no issue male*, then it failed by reason of the existence of such issue male; and if, on a *general failure of issue male*, at
any

any time, then, as a remainder, it could not take effect, unless such default of issue happened, at furthest, by the expiration of the preceding estates, viz. the deceases of *A. B.* and his wife, and their *eldest son*; and that will not be the case, if any issue male of *A. B.* should be living at the death of his eldest son *D.*; and it seems to me too remote in any other view.

Indeed, it is not only postponed to a failure of issue male, but also of *issue female*. However, as the limitation to the latter seems *void* in event, and the limitation over is on failure of *the objects* of the limitation that has so failed, I think, it might take effect, as if such preceding limitation had been omitted, as in the case of a remainder after an intermediate limitation, either originally void, or failing in event; but the limitation *seniori exitui masculino* has not failed; nor was the limitation over, in default of *any issue male*, confined to the failure of the *objects* of the former; for that extends only to an *eldest son*; and the *latter* is postponed to the failure of *any issue male*. Had it been merely in default of *issue male*, I think, those words might have been construed to mean, the *issue male before mentioned* in the limitation; but the word *ullius* seems to put a negative on such construction.

Where an ulterior remainder is limited after an intervening one, that is either void in its creation,

creation, or eventually fails; or takes only a partial effect, the latter seems good upon the failure or determination of the former, and subject thereto. But, where the last is not confined to the failure or determination of the preceding estate, but is made to depend on an event collateral thereto, then, unless such event happens by the time that all the preceding estates determine, (if not supported by a trust,) I apprehend, it fails of course, as well in the case of copyholds as freeholds; and the remainder to the heirs of *A. B.*, in the present case, in default of any issue male, where the limitation to *such issue* is confined to the *eldest issue male*, appears to me to fail under that predicament; and, if so, there does not seem sufficient ground for *C.*'s son, or any body else, to establish a claim under the said *limitation*, to the right heirs of *A. B.* But the point is too difficult for me to pretend to any thing more than a mere inclination of opinion.

UPON the last case.

It was afterwards stated, that *A. B.* was admitted in fee, upon his purchase; and, upon his own surrender afterwards, was admitted in the manner before stated.

As *A. B.* stood *admitted in fee*, previous to the surrender, I am of opinion, that the limitation in that surrender, to the use of *his right heirs*, was part of the *former estate* remaining in him, as the reversion in fee undisposed of by that surrender; vide *Thrustout v. Cunningham*, 2 *Black. Rep.* 1046., and *Roe v. Griffiths*, 4 *Burr.* 1952.; and, consequently, that it descended on his heir at law, according to the custom, that is, the youngest son *C.*, and, on his death, to *his son E.*, who, I think, had *C.* even died in his father's lifetime, would have been entitled *jure representationis*; that is, as representative of his father, according to the case of *Clements v. Scudamore*, 1 *Salk.* 243. 1 *P. Wms.* 63. Therefore,

I conceive, that *E.*, the son of *C.*, is entitled to that reversion, if *A. B.* made no disposition thereof by will, and a surrender to the use of it; and that he may, after the death of *D.*, bring an ejectment for it, even before admittance, as his title is by descent; and, considering *D.* as taking no more than *an estate for life*, under the surrender above stated, it follows, that he cannot, by any means, acquire the fee.

UPON such limitations over, of personal estate, in default of issue of the first taker, as are considered as substitutionary, or alternative for those to the issue. See 1 *Durnford and East*, 593.

WHEREVER there is a limitation of a *chattel* to a person, and if *he die without issue*, remainder over, the remainder is too remote, not being to take effect till a general failure of issue, which may not happen for some generations. But where the limitation to such person, either indefinitely, or for life, is followed by a limitation to his *children or issue*, that may answer the relation of the word *issue* in the limitation over; the words *dying without issue*, in such limitation over, have been held to signify the *issue before mentioned*, and to whom the antecedent limitation was made; *vide* the case of *Vaughan v. Farrer*, 2 *Vez.* 182—6. And, under that construction, it seems, the limitation over is eventually good, not as a remainder

after, but as an alternative to, or substitutionary disposition for the limitation to the issue, should that fail for want of any such issue; as in the cases of *Higgins v. Dowler*, 1 P. Wms. 98.; *Maddox v. Staines*, 2 P. Wms. 421.; *Stanley v. Leigh*, 2 P. Wms. 686., and several others to the same effect. And therefore, as there is a limitation in this case to the children of G. L., I incline to the opinion, that the words, *die without issue*, &c. in the limitation over, are to be construed as referring to the issue before described, just as if the words had been, "die without such issue."

The case of *Vaughan v. Farrer*, above cited, seems very much in point to the present question. There, upon a devise of real and personal estate to one for life, and, if she left children, the whole to such child or children; but, if she should die without issue, then to other purposes; it was contended, that the limitation of the personal property was too remote, and that the whole vested in the first devisee.

But Lord Hardwicke held the contrary, observing, that wherever the general words, *dying without issue*, are mentioned relative to personal estate, the bequest of which is limited so as properly to take place, the Court has construed them to mean, *such issue as before described*. Indeed, it is natural enough, when a testator gives property

perty to *certain issue* by description, and then gives it over in *default of issue*, to suppose he meant in default of *that issue* to whom he had before given it. The present seems a stronger case in favour of the limitation over than that of *Vaughan v. Farrer*; for the above mentioned construction might, in that case, eventually have given the property over, in exclusion of issue, because the limitation was confined to children whom the mother should leave, and she might have left no child, but one or more *grandchildren*, not falling within the description of *such issue as before mentioned*; but here the limitation being to the children generally, would have vested in them on their birth; so that if there had been any issue, they must have taken in exclusion of the remainders over.

I am therefore of opinion, that as *G. L.* had no child at the time of the testator's death, nor afterwards, the limitation over (considering the word *issue* as relating to issue before mentioned, *viz.* children) is good in event, though, had there been a child born after the testator's decease, the whole would have vested in such child in exclusion of all the limitations over.

But supposing the limitations over were to be decreed too remote, which, for the reasons I have mentioned, I conceive, as the event has happened, they are not, then I should be of
opinion,

opinion, that, as the estate was limited to *G. L.* expressly for *his life*, the subsequent words, *and if he happen to die without issue*, did not enlarge his estate, as they might have done had the limitation to him been *indefinite*; but that the remainder in the estate belonged to the testator's two sons *R. and G.*, as joint residuary legatees, according to the opinion of Lord *Talbot*, in the case of *Clare v. Clare*, *Cas. temp. Talb.* 21.

UPON a power of disposition given by a testator to his wife; and that her execution of it, by will, during her second marriage, was valid.

" C. D., by will, bequeathed all that his house and
 " lands in X. unto his wife, and her heirs,
 " for ever; (and did thereby authorise and
 " empower his said wife to sell the said
 " house and premises, to pay his just debts,
 " if she should think proper;) but in case
 " his said wife should die *without making*
 " *her last will and testament in writing,*
 " or issue lawfully begotten on her body
 " by him or some other man, then his will
 " was, and he thereby gave, devised, and
 " bequeathed, after his said wife's death, if
 " she died without will or issue as aforesaid,
 " all and singular the said house and pre-
 " mises, if not sold for the uses aforesaid,
 " unto his right heirs for ever."

The testator died, leaving his widow him surviving, who afterwards married F. S.; and, during her coverture, she, by will duly executed, reciting *verbatim* the devise to her,

gave the house and premises to her husband, for life, and his son by a former wife, (having no child of her own,) in fee.

I APPREHEND, from the loose manner in which the will is penned, this case may be the subject of different opinions. But I rather incline to think, that S. took *an estate* tail in the lands in question, with a power of sale, for payment of the testator's debts, and a *power of disposing of the lands by her will*. I think the word *beirs*, in the first devise to her, is explained and qualified *into heirs of her body*, by the subsequent limitation over on her dying without issue lawfully begotten on her body by the testator, or any other man; and indeed the power of sale for particular purposes only seems to imply, that she was not to have the fee; and the limitation over being made to depend on her dying without *making her last will and testament*, appears to me manifestly to import a *power* for her to dispose of the lands by will, and to reduce the question merely to this, Whether such power extended to a will made by her during coverture, or was prevented or suspended by her subsequent marriage?

In

In the case of *Rich. v. Beaumont*, 2 *Eq. Cas. Abr.* 159., the Court of Chancery seemed to consider the marriage a suspension of such power, and dismissed a bill brought by a devisee under the will; but the reason for such dismissal appears, 3 *Bro. Cas. Parl.* 312., to have been, that the Court thought the proper remedy in that case was *at law*, and not in equity; and the decree of dismissal was afterwards reversed by the House of Lords, and a case directed to be stated for the Court of King's Bench, 3 *Bro. Cas. Parl.*; and though the further proceedings upon it do not appear, yet it is said, in citing this case, 2 *Vez.* 64., that it was *held* a good appointment by the Court of King's Bench.

Indeed, a power of disposing by will, seems to me to involve in it a power or qualification in the person, of making a will for the purpose; that is, of executing the power by an instrument, having the requisites, in form and mode of execution of a will, to pass the same sort of property; and it is generally established, that naked authorities or powers, whether given before or after coverture, may be *executed* during coverture, without words to dispense with the disability of coverture; and so may authorities coupled with an interest, where they are collateral to, and do not flow from the interest; vide *Co. Litt. Butler's* 1st edit. 112. a. note 6. If this devise, indeed, could be construed a de-

vis in fee to the wife, with an executory devise over on her dying without a will, and without leaving issue living at the time of her decease, then would her will, made during coverture, I conceive, have been void, as this devise by her must have then taken effect, or flowed from her *own interest*, viz. the fee. But mere constructive executory devises are never admitted, unless from necessity.

Upon the whole, therefore, it appears to me, that S. took only an estate tail, with a power of disposition by will, and that such power was not suspended by her coverture; and, consequently, that her will, being duly executed and attested, though during coverture, was a valid execution of that power.

THAT

THAT a power of sale, inserted in a marriage-settlement made in pursuance of proposals, is probably valid, though the power was not expressly noticed in such proposals.

I HAVE perused the above draft, and made all the alterations in it that I think proper or regular, on behalf of *A.*; but I do not find any covenant for the production of the title-deeds, referring to a schedule. This, I presume, is proposed to be done by another deed; if not, it should be inserted in this. Subject to this observation, I approve of the draft as it now stands, on behalf of *A.*; but I am to observe, that, upon my re-perusal of the copy of *B. C.*'s marriage-settlement, I cannot satisfy myself so perfectly as I wish to do, though it did not strike me as a matter of any doubt when I gave my opinion on the abstract, and perhaps now only floats on the surface of abundant caution, whether a question may not be raised upon the title,

in respect of the power of sale in the settlement not being *expressly* warranted by, or noticed in, the proposals on which that settlement was grounded.

The powers of leasing fall under the same predicament; and yet, I clearly conceive, there can be no question at all respecting their validity; I mean validity *in equity*, for all the powers are clearly valid at law, being created in a settlement of the *legal estate to uses*, under which they arise; but powers of leasing and powers of sale seem distinguishable; for the first are requisite for the improvement, or at least preservation, of the estate; the latter not. However, as proposals for a settlement are generally understood and considered as containing only the material outlines and essential groundwork of the intended settlement, respecting the nature and extent of the provisions thereby proposed or agreed upon, which are to be filled up and completed in the execution, with such usual and convenient clauses, powers, and provisos as are not inconsistent with the provisions and limitations proposed; and as the power of sale, and investing the money in the purchase of other lands, is very regular, usual, and convenient in settlements of estates comprehending a variety of distinct parcels, and not prejudicial to the security or interests of the issue, where it is vested in trustees, and not in the parents themselves, and is not at all inconsistent with the scope
of

of the proposals, nor lessens the extent of the provisions, estates, and interests thereby agreed upon or proposed to be limited; I apprehend, its validity in equity is not to be affected, on the ground of its not being mentioned in those proposals. But, for complete satisfaction on this point, I must recommend it to the purchaser to take the opinion of some gentlemen of the first practice and eminence at the Chancery bar,

THAT the execution of a power of sale by an infant is good.

I AM of opinion, that *A.* and *B.* took the copyhold estate in question between them, (in remainder, after the decease of their parents, as tenants in common, in fee,) by purchase (of course) under the uses of the surrender in 1746; and as the admission of the tenant of the particular estate is, to all purposes, except that of prejudicing the lord of his fine, an admission of those in remainder, I apprehend that the admission of *C.* and his wife was a sufficient admittance of their daughters to the remainder, to enable them to make a surrender, if the lord accepted of it, as it seems he did, and admitted their surrenderee, under their surrender in 1780; and as to the question, upon the infancy of the testator's *son*, one of the executors, I am not *apprised* of any case where the same point respecting an *infant* has been actually decided.

But

*But it seems so far within the principle of the law respecting the validity of a sale by a feme covert or monk, under a power to sell, and is so considered; Brook. Abr. Devist. 12.; in the case of *Hearle v. Greenbank*, 3 Atk. 695.*

Indeed, Lord *Hardwicke* held, upon very good reasoning, that an infant could not execute a power coupled with an interest; but he took the distinction between such a power, and a power simply collateral in the nature of an authority, of which description a mere power of sale appears to be. And, on this distinction, and the authority I have referred to from *Brook*, I incline to think infancy is no obstacle to the execution of the power of sale by the son, in the present case.

If it should be said, it is a power, the execution of which requires a discretion, the answer is, the price is not arbitrary, or at the discretion of the executors, but to be the best that can be gotten for the same, which is a fact to be ascertained independently of any discretion in the executors. I am to conclude, that there is no room left for any doubt on such adequacy of price; and, if so, should recommend a joint bargain and sale from the mother and son to the purchaser, in fee, in pursuance and execution of their power, and that the purchaser be admitted

mitted thereon; and, at all events, I conceive, that if the power could not be effectually executed, the heir would in equity be a trustee for a *bonâ fide* purchaser, for full consideration, and compellable to perfect the title to him.

THAT

THAT a purchaser under a power of sale in marriage-articles, is bound by the terms of those articles, though the power was altered and enlarged by the settlement after marriage; and some directions are given as to the conveyance to the purchaser, and for his security in the application of the purchase money.

As there is a proviso in the articles, expressly *ascertaining* the nature and extent of the proviso or power for sale agreed to be contained in the settlement, I apprehend the parties had no right to alter or enlarge such power in the settlement, but were tied down to the power expressly prescribed by the articles; that power is for the husband and wife, with the consent of the trustees, to sell and dispose of any of the estates intended to be settled; the husband "*assuring other estates of equal or greater value,*" to the "*same uses.*" Such assurance of other lands, therefore,

therefore, appears to be one of the terms or conditions of the power of sale reserved by the articles; for which reason, I conceive, a purchaser cannot be considered as secure without such condition is complied with; that is, without seeing other lands, *of equal value*, settled to the same uses; and, consequently, that he will at least be bound to see to the application of his money in a purchase of other lands, and to a proper settlement of such other lands, notwithstanding the power of sale in the settlement.

Regularly, I think, the assurance of the new lands should either have preceded, or, at least, accompanied, the sale of the settled lands; but, if the purchaser takes care to see the money actually laid out in the purchase of proper lands, and a proper settlement thereof made to the old uses, I think he will be safe, as the power in the articles will have been substantially pursued, by the assurance of other lands of equal value, to the same uses, though it was not done at the same time.

If there were a purchase at hand, the business might be effected at one and the same time; the mode of conveyance, if the purchaser will accept of the title subject to such attention and responsibility in the mean time, I apprehend, may be by lease and release, reciting the articles and settlement, and the surrender of the copyholds,
and

and the contract for sale; and then the husband and wife, in order to enable them to make such sale, may, in pursuance of the power reserved by the settlement, alter, revoke, change, and make void the uses, trusts, &c. declared by the settlement, and by the surrender of the freehold and copyhold lands respectively; (*both which, I presume, were mentioned in, and subjects of, the articles;*) and then may, in pursuance and execution of the power reserved to them by the articles and settlement, grant, bargain, alien, sell, release, and absolutely dispose of the same estates, as well freehold as copyhold, (referring to a lease for a year of the freeholds,) to the purchaser and his heirs, *habendum* to and to the use of him and his heirs, discharged of the uses and trusts of the settlement and surrender. There should be a covenant for surrendering the copyholds, which should be surrendered to the use of the purchaser and his heirs accordingly, in execution of the power of sale reserved to them in the settlement and uses of the surrender. The purchase money should be paid, by the direction of the husband and wife, to the trustees, who should give receipts for the same to the purchaser; and the husband and wife should also acknowledge such payment thereof accordingly; and the husband should enter into all the usual covenants, for title, &c.

By this means, I conceive, the purchaser will acquire the absolute *legal title*, under the power in the settlement; but, on account of its variation from the express power in the articles, I think his title will not be complete in equity, till a purchase is made of other lands, and those lands settled to the same uses. It may, therefore, be prudent for him to have the purchase money invested in the joint names of the trustees in the settlement, and of himself, or some trustee for him, with a power of nominating a new one, on the death of *any* former, till the intended purchase and settlement is made, if he thinks fit to engage in the execution of such trust, which will of course call for his attention to the *title* and *value* of the lands to be purchased, and the propriety of the settlement to be made. I do not see that a fine will be requisite, as the purchaser will come in, not under the parties conveying, but under the settlement itself, which contains the power of sale.

THAT

THAT the execution of the following power of appointment given by a testator to his wife, must be confined to the objects specified by the terms of the power ; but that it includes a liberty to share and apportion the property, and to subject the same to some restrictions, limitations, and conditions.

A., by will, gave and devised his real and personal estate to his wife, for life ; and, from and after her decease, he gave and bequeathed the same unto his two younger children, B. and C., their heirs, executors, and administrators, in such parts, shares, and proportions, and manner, and subject to such restrictions, limitations, and conditions, as she should, in her lifetime, by any deed or deeds, with or without power of revocation, or by her last will, direct, limit, declare, or appoint.

I HAVE

I HAVE perused the above draft, which, with a few corrections, I think would answer the intent of the testatrix, if the power of appointment she derives under her late husband's will enabled her to make the dispositions of his property expressed in such draft. But I am of opinion, that the power given her by her said husband's will, of appointing his property to his two younger children, falls far short of the extent of the dispositions she is desirous of making.

That power is confined, in regard to its objects, to the said two sons, and, consequently, does not authorise her to introduce any stranger as trustee or committee-man, or child or issue of either son, into the extent of her appointment.

It also appears to be confined, in respect to the nature or quantity of estate or interest to be appointed, namely, to those two sons, their heirs, executors, and administrators; heirs applying to the real estates, and executors and administrators to the personal; so that, I think,
she

she cannot appoint *less* than a *fee* in the real estates, nor than the whole interest in the *personal*.

The extent of her power seems confined to the determining the particular parts and proportions which her said sons shall take in the said property, and of annexing to either son's estates any legal restriction, limitation, or condition, in regard perhaps of going over to the other of them, in certain events and proportions, and not to the advantage or benefit of any other person, or of the children or issue of either; for any such other person, or issue, or child, are not the objects of the power mentioned in the said testator's will; and any restriction, limitation, or condition operating to give or secure the estate to such child, issue, or stranger, would in effect amount to an appointment to such child, issue, or stranger, instead of the sons to whom the property is expressly given by the testator's will, and would be contrary to the giving it to the said sons, their heirs, executors, and administrators, as it is given by the testator's will. And, I conceive, any attempt of this sort would, after the testatrix's decease, involve her family, that is, her said sons, and their issue, in litigations and suits, which, besides laying the foundation for family feuds and inveterate dissensions, might exhaust a great part of the property intended to be secured, and leave the residue just in the same

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state

state as the testatrix would have left the whole, if she had made no appointment at all.

She may safely appoint one part of the freehold and of the personal to one son, his heirs, executors, and administrators, and the residue to the other, making such divisions, in what proportion she pleases; and I think she might annex any reasonable restriction, limitation, or condition to either share, so as to give it, or at least a greater part of it, over to the other son, in a certain event. But then, I conceive, it must be so given over to that other, his heirs, executors, and administrators, according to the nature of the property, real and personal, and not to his issue or children, as I have observed before. And such a limitation, therefore, would not answer the intent, because either son, who was to receive the benefit of such conditional limitation, might dispose of, and depart with, such contingent interest, before it happened or accrued; and it would be liable to the claims of his creditors, under a commission of bankruptcy, and would by no means be secure to his issue.

And as to the laying any sort of obligation upon either son, in point of interest, to abide by and establish the wished-for disposition, by giving the greater share to the other, if he refused it, that could by no means have the effect; for whatever advantage be given to one son, as an inducement

inducement for his compliance with an appointment exceeding the limits of the power, would operate in the same proportion on the other son, to oppose the unauthorised disposition, and set them aside, and thereby entitle himself to a moiety of the property, for want of a proper and effectual disposition within the clear limits of the power.

If any thing is to be done, by making it the interest of the appointees to abide by or establish the disposition intended, the inducement must extend equally to both sons, and of consequence must arise out of the disposition of some other property not comprised in, or confined to, the power of appointment, and which the testatrix can give as she pleases; and it must be of value sufficient to counterbalance, at least, the prejudice which the sons might otherwise consider themselves as sustaining, by the disposition intended by the testatrix, of her late husband's property. I know of no other means by which the testatrix can, with any prospect of success, attempt the disposition of her late husband's property, expressed in the above draft.

THAT it is unreasonable for a purchaser to require an indemnity against an appeal to the House of Lords, after a decision in favour of the title in the Court of King's Bench, and a decree for the acceptance of the same title by the Court of Chancery.

As to the purchaser's requiring an indemnity against an appeal from the decision already made upon *A.*'s title, I must confess it appears to me a requisition very extraordinary. It is admitted that such an appeal is by no means probable; the mere possibility of it is surely not a sufficient ground for objection to the title. If it were, I know not what would become of half the titles in the kingdom; for no title that involved a question which had not been carried up to, and decided by, the House of Lords, could be acceptable on such a principle; for any former decision of the same point, in any inferior court of judicature, in any former or other case, would not
prevent

prevent the bringing the same point again to a legal discussion, in another case arising upon the same title, which would open the way to an appeal to the House of Lords, or court of dernier resort. This, I say, would be possible in any question not actually decided before by the House of Lords; nor could the possibility ever stop there; for a point even decided half a century before, by the House of Lords, might be supposed, in possibility, to stand a chance, at least, of a different decision now, between other parties, under the influence of other circumstances, before different judges in the same court; so that no title, depending, in any degree, on a question not actually decided in the House of Lords, upon the very same case, could be prudently accepted without an indemnification, extending to the limits allowed by the statutes of limitation, for agitating the question in a court of justice.

For these reasons, I do not think the requisition of an indemnity, against the possibility of an appeal to the House of Lords, in the present case, can be justified. Indeed, the Court of Chancery has concurred with the Court of King's Bench, in assuring us that it cannot; the latter, by their opinion, that *A.* was entitled to an estate tail under *B.*'s will; and the former, by compelling or decreeing a purchaser to accept the title without any such indemnification.

If, under the opinion of the Court of King's Bench, and a decree of the Court of Chancery, the title was held to be such as a purchaser ought and was bound to accept, with what colour of decency can I presume to tell another purchaser, that the same title requires an indemnity, and that he is not bound to accept it without.

The conveyance may be by deeds of lease and release, or bargain and sale, inrolled, from *A.*, to and to the use of the purchaser, and his heirs. If *A.*'s wife is barred of dower by a settlement, a fine is not necessary; otherwise, a fine from her and her husband would be requisite to bar her of dower,

· THAT

THAT a purchase in the names of three illegitimate children may be considered as a provision for them.

I SHALL first answer the question respecting the copyholds, as to which I am to observe, that where a purchase is made in the names of persons from whom no consideration moves, and being strangers in blood to the real *purchaser*; that is, to the person actually paying the purchase-money or fine for such purchase, such persons are considered as trustees for the person paying the fine or consideration-money, and he may then dispose thereof as he thinks proper. But where the purchase is made by a parent, in the name of a child otherwise unprovided for at the time; especially if the child be then an infant, such purchase appears to be generally considered, not as a trust for the parent paying the purchase-money or fine, but as an advancement or provision for the child in whose name the purchase is so made; vide 2 *Vern.* 19. 1 *Chanc. Cas.* 296. *Finch. Rep.* 338., and 1 *Atk.* 386.

I therefore, in the present case, incline to the opinion, that the purchase made by *A.* in the names, and for the lives, of his three natural daughters, who are styled his daughters on the admission, as above stated, and had then acquired, by reputation, a legal description as purchasers by that name, is to be considered as a provision made for them.

Had it been the case of lawful, instead of natural, children, I should have been clearly of that opinion; and the only difficulty on this point, in the present case, seems to me to arise from the circumstance of their being natural children. But, considering the natural obligations a man is under to provide for such children, as well as the legal demands upon him, by our poor-laws, at least, ultimately grounded in the original and necessary connexion between the laws of nature and of society, I apprehend, the principles of natural obligation, public convenience, and parental duties, will, however diminished in strict legal force, in respect of their deviation from the direct mid-channel of legal adoption, still extend to the present case, it not being to raise an equity against the law, as in supplying the want of a surrender, &c. but in support of the legal title, which is in the daughters, against a constructive equity for the parent, so as to bring it within the influence of the rule above noticed. I think, at least, it is not to be

be

be considered as in the breast of the parent of such children to deny or dispute the extent of the rule to them, whatever colour there might be in favour of creditors having claims not otherwise to be answered out of his property.

I therefore incline to the opinion, that his three daughters are now entitled to the copyhold estates in question, for their lives, successively, according to the grant, subject to any right which the first life may have, by the custom of the manor, to make any disposition or alteration of or for the subsequent lives.

THAT

THAT in order to suffer an equitable recovery, where the freehold is given to a feme covert's separate use, a fine is necessary for making the tenant to the præcipe.

THE trust under which the trustees were directed, during the wife's life, to *receive* the rents and profits, and, after *paying off all* outgoings, &c. to pay the wife's annuity, and the surplus, to the niece, for her *separate use*, I conceive, clearly invested them with the *legal estate* during the wife's life. After that, the *use* declared from the decease of the wife, as to the *A. B.* estate, I apprehend, became executed in the testator's brother *H.* in fee, subject to the defeazance thereof, in the event mentioned, of his refusal to accept the same in lieu of the annuities for which it was intended as a satisfaction. And, as to the residue *of the estates*, after the wife's decease, I conceive, the *use* being in effect limited to the *trustees*, and the survivor, and the heirs of such survivor,

survivor, invested them with the legal estate accordingly; and that none of the subsequent trusts were uses executed, as a use cannot be executed upon a use; but that all the subsequent limitations were mere trusts or equitable estates.

The limitations of those estates, after the wife's decease, is to the *use of*, and in trust that, the said *trustees*, and the *survivor of them*, and *the heirs and assigns of such survivor*, should, &c. which is at least equivalent to a limitation to the use of the trustees, and the *survivor*, and *the heirs and assigns of such survivor*, in trust, that such *trustees and the survivor of them*, and the *heirs and assigns of such survivor*, should, &c. This would clearly have given the *legal freehold*, to the trustees, with the legal fee in contingency to the *survivor*, which has now become vested in such *survivor*, by the decease of his co-trustee.

But, abstracted from this express limitation of the use itself, the trust for *sale or mortgage* of all or any part of the estates, seems sufficient to decide the construction of the *legal fee* passing to the trustees, as essential to the execution of that trust. And then it follows, that all the subsequent uses must be mere *trusts*, or *equitable estates*.

I am

I am therefore of opinion, that the legal estate in the lands so devised to the trustees, is in Mr. O., as the survivor of those trustees; and that all the subsisting estates, as well the freehold limited for N., as the estate tail in Q.'s son, and the ulterior remainders and reversion, are all equitable estates; and, consequently, that such estate tail, and the said ulterior remainders and reversion, may be barred by an *equitable recovery*; that is, a recovery against an equitable tenant to the præcipe, which N. and his wife, and Q.'s son, may, I conceive, make, without O.'s concurrence, by lease and release, and a *fine* from N. and his wife. A recovery, duly suffered against *such a tenant to the præcipe*, wherein Q.'s son is vouched, I conceive, will bar the estates tail of Q.'s said son, and the *ulterior* remainders and reversion, and acquire the equitable fee, subject only to the contingent estates tail to the possible sons and daughters of N., which will not be prejudiced by such recovery.

I think a *fine* requisite on account of her estate for life being limited for her *separate use, exclusive of her husband*, and so not investing him with the *equitable freehold in her right*, to capacitate him to pass it by *lease and release*, to the intended tenant to the præcipe; which, I conceive, *her fine* will do.

Supposing

Supposing Q.'s estate to have been a legal remainder, I then conceive the case would fall within the doctrine of *Salvin v. Thornton*, and, of course, that no effectual recovery could be suffered during N.'s life, without the concurrence of the trustee, in whom the legal freehold undoubtedly must be during her life, to answer the trust for her separate use. Or if the trust, in this case, for N.'s separate use, could be deemed so *specifically different* from a *general trust* or *equitable estate*, as to incapacitate her to make a tenant of the *equitable freehold*, that circumstance would invalidate the recovery.

But, in my apprehension, such a doctrine is not maintainable; for as a *trust for the separate use of a feme covert*, during her life, has not been held so different from a general trust, as to prevent it from *uniting with a general trust for the heirs of the body*, (according to *Shelly's case*,) or to obstruct her taking an *equitable estate tail*, (*vide cases and observations on the very point in the 4th edition of the Essay on Contingent Remainders, page 74.*), I apprehend she is completely entitled to the whole equitable interest for her life under it, though the rules of equity *withhold it from her husband*, and that she is accordingly competent to transfer that equitable estate *by fine*, so as to make an *equitable tenant to the præcipe*, sufficient for
a good

a good equitable recovery; vide *Penne v. Peacock and ux.*, *Cas. temp. Talb.*, of the effect of a *fine* by husband and wife, in passing her interest in estates settled to her separate use.

THAT

THAT where lands are given to one in tail, with a conditional limitation over in the event of his alienation, the præcipe for suffering a recovery should be brought against the tenant in tail in possession himself, in order to avoid any question that may arise upon such conditional limitation.

I AM of opinion, that *A. B.* took an estate tail under the limitation, “ to the use of himself for life ; and, after his decease, to the use of the heirs of his body,” according to the well-known rule in *Shelley’s* case ; and as to the restrictive clause, I conceive, it can operate only as a conditional limitation ; which, however valid it might be to restrain an alienation by any other means, cannot, I conceive, restrain him from suffering a recovery, or levying a fine, within the statute of fines ; for the power of suffering a recovery, or levying *such a fine*, is considered so incident to an estate tail, that any condition

condition or proviso restraining or prohibiting it, is held to be repugnant to the nature of the estate, and therefore void; vide 6 *Co. Rep.* 41., 10 *Co. Rep.* 38., amongst other authorities. I therefore conceive, that the recovery by *A. B.*, in this case, will not forfeit his estate, or give effect to the conditional limitation over, mentioned in the restrictive clause; but that a recovery suffered by him, before any breach of the condition, will bar his estate tail, and the remainders and reversion, together with the conditional limitation over, and acquire him the fee discharged therefrom; according to the cases of *Page v. Hayward*, 2 *Salk.* 570.; *Pigg. Com. Rec.* and *Driver v. Edgar*, *Cowp.* 379., and subject only to the charge of debts, and the legacy of ——— charged thereon by the will.

The only doubt seems to be, how far a previous conveyance for the making the tenant to the præcipe, may be deemed a breach of the condition, before the recovery suffered; and though I should incline to think a conveyance might be effected for this purpose only, without incurring a breach of the condition, yet I think it may be better to avoid the question by a recovery with single voucher, in which the præcipe should be brought against *A. B.* himself, who may vouch over the common vouchee, pursuant to an agreement for that purpose, in a deed between him and the intended demandant, in which the use

may be declared to himself in fee, or otherwise as may be thought proper. He may then raise money for payment of the debts, &c. which otherwise, I think, would be to be raised under the direction of a court of equity; for, as *A. B.* is now tenant in tail in possession, such a recovery, with single voucher, will bar the estate tail of which he is so seised in possession, and the remainders, &c. and acquire him the fee.

If it, indeed, was necessary to have a recovery with double voucher, a tenant to the præcipe might, I conceive, be made by fine, without incurring the forfeiture of *A. B.*'s estate, under the proviso. But as a recovery against himself, as tenant to the præcipe, he being tenant in tail in possession, appears sufficient, there seems no occasion for the additional expence of a fine.

THAT estates tail in different persons, and the remainders over, may be barred by one recovery, in which they are jointly vouched; but that such a recovery is not eligible.

A., tenant in tail of an estate with remainders over, and *B.*, tenant in tail of another estate with remainders over, joined in making a tenant to the præcipe, for suffering a recovery, for barring such estates tail and remainders over. They were jointly vouched, and vouched over the common vouchee. This practice has much prevailed; but a doubt has arisen with respect to the validity of such a recovery.

Your opinion is requested upon this difficulty, for the direction of several country practitioners, who will think themselves much obliged by your reasons at large.

THE general terms in which the query upon the above case is proposed to me, involve two distinct questions; the one, respecting the strict legal validity; the other, the general propriety or eligibility of the practice in question.

In regard to the first point, I conceive, that the recoveries in question would be supported by our courts of law. I think their strict validity is derivable from the very same principles upon which *Holt* maintained the validity of the recovery, in the case of *Page* and *Hayward*, reported 2 *Salk.* 570. (but much more fully at the latter end of *Piggott's Treatise on Common Recoveries*). *Holt* there held, that where a recovery would be good in case the præcipe was brought against two persons jointly, there a recovery, wherein those two persons were vouched jointly, (if there was a good tenant to the præcipe,) would be good; because the vouchee becomes tenant in law to the writ.

Now, if we suppose a joint præcipe to be brought against two persons, of lands whereof they are severally seised in distinct parcels, (as

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the persons joining in the recovery now in question are,) the question is, Whether a recovery so suffered would be good? If it would, then, upon the principles laid down by Lord *Holt*, a recovery, wherein such two persons are jointly vouched, (there being a good tenant to the præcipe,) would also be good; and such is the recovery upon which the present case arises.

To resolve this question, we are to consider, that the joining of a stranger with the tenant in tail in the præcipe, does not of itself vitiate the recovery, as appears by Lord *Holt's* argument in the case above cited.

Now, in the case I have put, each of the two persons is, in fact, a stranger as to the lands of the other; and therefore, his being joined in the præcipe with that other, will not vitiate the recovery so suffered by that other. It is true, indeed, that either of them might, by pleading several tenancy, abate the writ; but then this, being matter which makes the writ abateable, will not avoid it, if not pleaded in abatement; as in the Marquis of *Winchester's* case, 3 *Co. Rep.* 1. (and *vide* same case, 3. b.) where baron and feme were joint tenants for life, remainder in tail to the baron, a præcipe was brought against baron only, and he vouched the common vouchee; it was resolved, although the feme

was jointly seised with the baron, for life, so that as well the baron, (against whom the writ was brought,) as the vouchee, might have abated the writ by the plea of joint tenancy; yet when the vouchee entered generally into the warranty, and thereby admitted the writ good, and the baron recovered in value against him, that for one moiety the recovery should be a bar to the estate tail, and remainders over; so, in our case, though several tenancy might be pleaded in abatement, yet if no advantage is taken of it, either by tenants or vouches, I conceive, the recovery so jointly suffered against such several tenants, would be good, when a præcipe was brought against them jointly.

I apprehend, for the reason above given, a recovery would be also good, in which they were both jointly vouched, if there was a good tenant of the freehold, against whom the writ was brought; and that is the very case in question. The objection to be taken would be, that the recovery being against them *jointly*, the supposed recompence enures jointly too; and then, as such recompence would not go to their issue according to the loss, such issue would not be barred, nor of consequence the remainders over. But the truth is, that although such recovery is had against them as *joint tenants*, by their own admission; and such admission will, in regard to the supposed recompence, bind *themselves* (as be-

tween themselves) by an estoppel, from claiming such supposed recompence in any other way; yet, their respective issues in tail will not be bound by such estoppel; for estoppels bind not the issue in tail, any more in regard to the supposed recompence, than in regard to the old entailed land in lieu of which it comes; so that notwithstanding this admission of the ancestors, the supposed recompence would enure to their respective issues in tail, according to their respective losses; that is, according to the values of the land recovered against them respectively (*vide the case of Ear and Snow, Plowd. 514.*); and then such common recovery may well bar such issues in tail, as well as all remainders and reversions expectant on the estates tail respectively.

Thus much as to the strict matter of law; but as to the question respecting the propriety or eligibility of the practice above stated, I must confess it is a practice which I never recommend, nor even assent to, without much reluctance. It is very irregular, and its validity depends upon principles not commonly understood; and its effect is therefore very liable to be disputed by the issue in tail, or remainder-men; and one dispute of that kind, though the recovery be supported through it, and adjudged good, must generally be attended, even to the party successful in the support of the recovery, with ten times

times the expence intended to be saved by declining the usual and regular mode of suffering the recovery. Besides, these irregular modes of doing business necessarily afford ground for doubts and suspicions respecting the validity of titles so acquired; and, consequently, by rendering the estates themselves less marketable, on that account, and thereby diminishing their value, they really lose in their *effect* as much at least as was intended to be saved, in the means adopted for attaining it.

My advice in regard to the practice, upon all those occasions, is, not so much to consider how far we may probably venture, without actually exceeding the strict limits of the law, as to make a point of keeping ourselves so manifestly and clearly within those limits, as to preclude any ground for a doubt or a question about our having done so. In short, my opinion of the practice in question is, *Fieri non debet, sed factum valet.*

THAT a recovery by *Jane A.*, tenant in tail, and *J. S.*, as baron and feme, is valid.

I RATHER think, that the addition of wife, &c. in the recovery, and deeds leading the wife thereof, did not invalidate such recovery, as the tenant in tail was described by her true *Christian name Jane*, and there seems no doubt with regard to the *identity of person*. The circumstance, of her being *wife or not* to *J. S.*, was immaterial to the effect of the recovery, if she came in upon the voucher, and vouched over,

The only point, I conceive, is the *certainty* as to the person, namely, Whether *Jane*, thereby described as *Jane the wife of J. S.*, and who was vouched with him, was the *same Jane* as was the tenant in tail under the will? If this can be shewn, as, I presume, it decidedly can, by the *description and recitals* in the recovery deed, I incline to think the recovery is not impeachable.

on account of her *addition* ; for, whether *married or not*, her being vouched in the recovery equally *barred* her entail, and the reversion ; and the recovery, I conceive, must be held to have had that *operation*, unless it can be shewn, that *non constat de personâ*. Indeed, common recoveries are now considered as *common assurances*, and, in general, receive the same favourable construction in supporting their validity.

I cannot, therefore, under the light in which the case strikes me, give *A.* and *B.* any sort of encouragement to expect success in any attempt they might make to recover the estate comprised in the entail and recovery, against the claims under the uses of that recovery.

UPON cross remainders by implication.

It seems formerly to have been understood as a rule, that cross remainders should not be raised by *implication* among more than *two*; but that rule has, by modern decisions, received a qualification which reduces it to a distinction of *presumption* in the two cases, namely, that the *presumption* is *in favour* of cross remainders between *two*, and *against* it *among more than two*; but that such *prima facie* presumption will, in either case, give way to circumstances expressive of the testator's intention; and, accordingly, in the case of *Wright and Holford*, *Cowp. Rep.* 31., and *Phipard v. Mansfield*, *ibid.* 797., cross remainders were adjudged to arise by implication among more than *two*.

In the first of these cases, the estate was limited to *all and every* the daughter and daughters

ters of *P. H.* and *C. M.* his wife, and the heirs of their *body* and *bodies*, as tenants in common; and, for default of such issue, to the testator's right heirs; and the words, in default of such issue, being referable to heirs of the *body* and *bodies* of *all and every* such daughter and daughters, were held to mean, default of issue of *every of them*; and, consequently, the heir could not take whilst any of the daughters, or their issue, continued. And, in the latter case, there was a devise to the testator's two brothers, of whom one was his *heir at law*, and a sister, and the heirs of their bodies, as tenants in common; and, for want of such issue, then to the testator's right heirs; it was held to be the testator's apparent intention, that all the three devisees should be *equally* benefited by the limitation, and that cross remainders must be implied, to continue the entail, as long as any of them, or their issue, existed, and prevent the inequality that otherwise would have existed in favour of one of them, *viz.* the heir at law, if the shares of the other two were to come to him upon failure of issue, without their having any benefit of his share upon failure of his issue.

Now, I think the present case as strong as either of those above cited, in favour of cross remainders. Here the devise over is not in default of *such issue*, to leave room for the question,

question, Whether the testator thereby meant issue *respectively*, or not, and require an explanation from other expressions? but it is upon death or failure of *my said daughters and children without any lawful issue*, THEN to the testator's heirs; so that the heir was not to take it before the death and failure of the said daughters and children, *without any lawful issue*; but this could not happen, so long as any of the testator's daughters, or their children, or *any* lawful issue of *any of them*, existed; for whilst there should be any lawful issue of *any of them*, it is clear the said daughters and children could not be dead *without any lawful issue*. Therefore the very words of the limitation seem necessarily to imply cross remainders amongst the daughters, and their children, in order to continue the effect of the devise to the extent of the *expression*, viz. till death and failure of the daughters and children, without *any* lawful issue; at which time, as the testator expresses by the word *then*, and not before, the heir was to take.

I therefore conceive, that the devise in question is to be understood as creating cross remainders in tail among the testator's daughters, and their children.

It appears to me, that the testator's two daughters, and their children, living at the decease

cease of the testator, took remainders in tail general in the freehold lands, as tenants in common, under the above-stated devise to them, in remainder expectant on the estate tail devised to their brother *A.* therein, with cross remainders in tail among them, so long as there should be issue of any of them; consequently, upon the failure of issue of *A.* by the death of his grandson *C.*, *D. B.* and his three sisters, being the only survivors of the testator's daughters and their children, to whom the estates were so devised in tail, became entitled to the said freehold estates equally between them in tail, with cross remainders among them, and the ultimate reversion in fee, expectant on failure of *all their issue*, descended to *D. B.*, the then heir at law of the testator, through the son and grandson, if unaffected by them.

As to such part of the devised estates as are *leasehold*, those, I conceive, became vested in *A.* absolutely, under the devise to him and the *heirs of his body*; because chattels cannot be entailed, and such a limitation gives the absolute interest therein, and, of course, that his personal representatives became entitled thereto.

UPON

UPON the limitations to be inserted in a marriage settlement of a lady's portion, required to be settled upon and for the use of the younger children of the marriage.

A. B., by indentures of lease and release, conveyed lands to trustees and their heirs, to the use of *C. D.* for life; remainder to the use of the said trustees and their heirs, during the life of *C. D.*, in trust, to preserve contingent remainders; remainder to the use of his first and other sons successively, in tail male, with divers remainders over to other persons, there being no limitations to the daughters of *C. D.* In the release is contained the following proviso:

“ Provided always, and it shall and may be
“ lawful to and for all and every person
“ and persons, who, after the decease of
“ the said *A. B.*, shall, for the time being,
“ be entitled to the said capital, and other
“ messuages and premises hereby granted,
“ to grant, convey, settle, and assure unto,
“ or

“ or to the use of any wife he or they
“ shall marry, as a jointure for the use of
“ such wife or wives, such part of the be-
“ fore-mentioned premises as he or they
“ shall think fit, so as such jointure or
“ jointures shall not exceed the sum of
“ 5*l.* yearly for every 100*l.* which he or
“ they shall have, and receive as a for-
“ tune with such wife; and so as such for-
“ tune shall be settled upon and for the use
“ of the younger child or children of that
“ marriage.”

C. D. means to marry *E. F.*, whose relation will give her 4000*l.* A doubt has arisen how to settle the 4000*l.* within the proviso, upon the younger children of the marriage, and whether the interest can be given to *C. D.* for his life, and a power of appointment to enable him to vary the shares of such younger children.

It is impossible to speak positively on a question of *construction*; but my opinion on the present case is, that the requisition of settling the fortune

fortune upon the younger child or children of the marriage, will be satisfied by settling the 4000*l.* upon them in the usual manner, after the father's decease, giving him the interest for life, and making the shares vest in the sons at twenty-one, and daughters at twenty-one or marriage; and also, making the share or shares of any dying, or becoming an eldest or only son, entitled to the real estate before such time of vesting, accrue to the others, and be vested and payable as their original shares, in the usual manner of provisions for younger children; and that the fortune may be limited to the father on no such younger son's attaining twenty-one, and no daughter attaining that age or marriage; and I think there may be a power (which is not an unusual one, and is for the benefit of the younger sons) inserted, for enabling the raising any part of a son's portion, for putting such son out in the world, even before it becomes vested; but I cannot advise a power of *appointment in the father*, as that would leave the effect of the settlement on the younger children, *in some degree, under his direction*, which, I think, the words of the clause in question do not authorise.

My reasons for the above opinion are, that the words, *which he or they shall have or receive*, are strong against *excluding the father from having*

or receiving any benefit at all out of the fortune so spoken of.

That if the interest is not given to him, it must accumulate for the younger children, possibly for twenty years before the birth of one, and afterwards during the father's life, even before the provision for the eldest son is made to commence; an intention not suggested by the clause in question, and too *improbable* in its nature to be supposed without the clearest manifestation of it.

That if there should be no younger child, there would be no object of the settlement of the 4000*l.*, nor, consequently, any thing to deprive the father of it.

That it cannot be reasonably supposed it was the intention of the clause, to vest a share in a child on its birth, and thereby, on its death within three months, entitle the father to it as such child's personal representative, in exclusion of the other younger children; nor, that a younger son becoming an eldest or only son, entitled to the real *estates*, before he should come to an age to require his portion to be vested, should be entitled both to the estate and the portion, any more than an original eldest son would have been.

Indeed, the construction of our courts of equity excludes from the provision *directed for younger children*, a younger son becoming an eldest or only son, entitled to the settled estate before the time at which he may be supposed to want a portion.

That, on these accounts, some period subsequent to birth seems requisite to be ascertained, as the time of the portion's *vesting*, with a provision to be made for the *accrualship* to the *other children*, of the intended portion of any child dying or becoming an eldest or only son, entitled to the settled estates, before the time for its vesting.

That there appears no principle for fixing on any other times, for this purpose, than those which are universally considered as the times when children may be supposed to have occasion for portions, and are accordingly adopted, in the most approved settlements, for the periods at which the portions are to become absolutely vested; that is, the age of twenty-one in sons, and that age or marriage in daughters; and that the eventual call for an application of any part of a son's intended portion, for placing him out before that age, may be properly provided for by such a clause as I have noticed.

That

That if, for the reasons I have noticed, it becomes proper not to make the portions vest till the time I have mentioned, it will follow, that on no child's attaining a vested interest in such fortune, there is nothing to prevent the limiting it to the father.

That the vesting it in the children absolutely on their *births*, would eventually operate to let *him* participate of the principal money directed to be settled on them; as, in the latter case, he would become entitled to the share of *every such child dying* an infant (under the age for testamentary disposition at least) in his lifetime, or in direct exclusion of the *rest*; whereas, in the former, he could not be entitled to any part of the 4000*l.*, if any younger child lived to the time for the provision's vesting, and he could not be let in to participate with any of his younger children.

That though no reference in the clause in question is made to the *usual modes* of settlements or provisions for younger children, yet, I apprehend, in such a general direction respecting a matter which is a subject of common practice, and enters the provisions of most settlements, in which it is reduced to some generally adopted lines of execution, a reference is to be understood to the usual modes of such settlements, where no particular directions are given incon-

sistent with such a conclusion, in order to avoid the confusion, uncertainty, inconvenience, and difficulty which must otherwise ensue, in executing the settlement required.

That the fortune in question is really in the predicament of being settled on the younger children, if settled on them in the usual mode that I have referred to; for, when so settled, who can deny that predicament of the 4000*l.*, the *fortune mentioned*, or *predicate of it*, that it is *not settled on the younger children*, or even not settled on them in the most generally approved and beneficial manner.

UPON the limitations proper to be inserted in a settlement, directed by a testatrix, where there is no more, on a particular event, than an implication raised in favour of the issue of the tenant for life.

THIS is a case of an executory trust, to be carried into execution by a conveyance *directed* by the testatrix for the purpose; and therefore I conceive it is subject to the modification of a court of equity, in supplying or correcting any apparent omissions or mistakes in the directions expressed by the testatrix.

The limitation over, in the event of the daughter's attaining twenty-four years of age, and departing this life *without issue*, strongly implies some intended limitation to her issue, if she should leave any, which is confirmed by the antecedent limitations to such children as she should leave, in case of her dying under twenty-four,

and that limitation perhaps might be adopted as the rule for supplying the omission in the event of her dying after twenty-four, leaving issue, *viz.* to all and every her children living at her decease, in fee; and if she leaves no such child, then to her appointment, &c. But as such a limitation would not completely reach the implication on the words, *without issue*, inasmuch as it would not meet the event of a child's dying in the mother's lifetime, leaving issue surviving her, I should rather incline to a limitation to the issue of the daughter in strict settlement, *viz.* to first and other sons successively in tail general; remainder to daughters, as tenants in common, in tail general, with cross remainders in tail amongst them; remainder to the appointees of the daughter, as directed by the will; remainder to her heirs. And as the conveyance is expressly directed to be to the use of the trustees, and their heirs, and it is requisite it should be so, in respect to the estate for life of the daughter, exclusive of her husband, and that the whole fee should be so, to make the ultimate limitation to her heirs attach in herself, I think it will be proper to make all the subsequent limitations mere trusts, by limiting the *whole fee* to the *use* of the trustees, and their heirs; upon trust, for the *separate use* of the daughter for life, &c.; remainder in trust for her first and other sons successively in tail general; remainder in trust for her daughters equally in tail, with cross remainders among

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them,

them, in trust, for the heirs of the daughter; vide *Roberts* and *Dixwell*, 1 *Atk.* 607.; *Roberts* v. *Kingsly*, 1 *Vez.* 238.; and vide 2 *Atk.* 73., as to this mode of strict settlement under an intended limitation to issue. But though such are my sentiments upon the question before me, yet I cannot help thinking the best way would be to make the settlement under the direction of a court of equity, upon an amicable bill by the daughter against the trustees, for that purpose.

THAT the freehold and inheritance must be of the same quality, namely, both legal, or both equitable, to unite within the rule in *Shelley's case*, 1 Co. 93. b.

A recovery of estates is declared, by a bargain and sale, making a tenant to the præcipe, to enure to the use of *A.* for life; and, after his decease, to the intent that his wife should receive a rent-charge, with the usual powers of entry, and a term for better securing the same; remainder to the use of *C.* and *D.*, and their heirs, upon trust, to assure the said estates to such uses as *A.* should, by deed or will, appoint, In default of appointment, to assure the same to the use of the heirs male of the body of *A.*, with several limitations over.

Observation and Query upon the Case stated.

The property included in this deed is very extensive; so that it is very possible that, as
to

to part of it, *A.* may die without having made an appointment thereof; if so, as the limitation to *A.*, which is of a legal estate, is followed by the subsequent limitation (which, until the trust is executed, seems only to give an equitable estate) to the heirs male of his body, may it not be doubted, whether it is within the rule laid down in *Shelley's* case? and a point hereafter arise, whether such subsequent limitation is executed in the freehold conveyed to the ancestor? or, whether it is to be considered as a contingent remainder?

As *A.* has the power of disposing of the whole property, by deed or will, in such manner as he thinks proper, and the same instrument that would execute this power, as to any part of the estate, may equally be extended to the whole, it seems unaccountable, that he should not remove any possible room for a question, regarding any doubts that may be the consequence of his omitting to execute such power. But, as I am to conclude he has his reasons for subjecting the execution of his power, in part at least, to the question respecting the possibility of a doubt, whether the

the ultimate limitation in the trust will give him an estate tail? I am to answer, that I not only think it questionable, but should (for reasons, which, unless particularly called for, a call which the nature of *A.*'s power seems most completely to preclude, I think it unnecessary to enter into) incline to the opinion, that the limitations in the present case do not fall within the rule in *Shelley's* case, so as to give *A.* an estate tail; but that the heirs male of the body of *A.* would be considered as taking an equitable estate tail by purchase, in the nature of a contingent remainder, in default of execution of *A.*'s power of appointment.

Further

*Further Observations and Query upon the Case
last stated.*

As it is immaterial to *A.* whether his heirs male take by purchase or by descent, he would not be at any expence to ascertain their taking one way or the other; but, if it be *questionable*, whether the heir takes in one way or the other, *A.*, to prevent a litigation, would undoubtedly be at any expence. You will, therefore, say, Whether, considering it in this view, it is so certain that *A.*'s heirs male would take by purchase, as to make it unnecessary for *A.* to take any steps to prevent the question from coming into agitation?

It's being indifferent to *A.*, whether his heirs male take by *purchase* or *descent*, (as there is no question at all that such heirs male must take in one or other of these two modes, in default of *A.*'s execution

execution of his power of appointment,) seems to render any question respecting the certainty of such heirs taking by *purchase* quite immaterial. But as I now collect it to be the wish of the gentleman by whom this case is laid before me, to know my sentiments upon the question, How such heirs male will take? I think it incumbent on me to answer, that I incline to the opinion, that such heirs male will take by *purchase*, in default of execution of *A.*'s power of appointment.

The cases on this point, of which the principal that have occurred to me, are those of *Tippin v. Coffin*, *Cartb.* 272., and *Lady Jones v. Lord Say and Seal*, *Vin. Abr.* v. 8. fol. 262. c. 19., seem to agree, that the estates respectively limited to the *ancestor*, and to the *heirs*, should be of the *same quality*, viz. both *legal*, or both *equitable*, in order to run one into the other, and form a coalition, within the rule laid down in *Shelley's* case.

It is true, those cases happened to be such, wherein the ancestor took only the *equitable freehold*, and the limitation to the heirs was of the *legal inheritance*. But when we consider, that it was the difference in the *natures* of the two estates, and not the order of the limitation of them, that prevented their flowing into one, the reason seems equally to hold in regard to two different estates,

estates, limited in the reverse order, on limitations of this sort. At law, the estate tail arises, not by any express regular limitation thereof, but by force of a *construction at law*; and when the limitations are both of an *equitable estate*, (without other ingredients in the case to controul the rule,) a similar rule is adopted in equity, to preserve an uniformity in construction. But where both the estates to which the rule is to be applied are not legal, a legal construction or operation of a rule at law, equally affecting both, seems to be excluded, by one of the objects of such construction not being a subject of *legal* conuizance.

The like observation holds in respect to the construction of a court of equity, in the case of such dissonant limitations; the one not being properly an object of equitable jurisdiction; and as there seems to be, in such cases, no ground for a *legal construction*, to bring it within the rule in *Shelley's case*, there is, of course, no rule of law for equity to follow in such cases, so circumstanced. A construction that shall unite the two dissimilar estates, and blend them into one, must proceed from a court having jurisdiction to give an *equitable estate* the qualities and properties of a *legal one*, or of reducing a *legal estate* to the level and properties of a mere *equitable interest*, which seems to be the province neither of a court of law, nor of equity. It would be difficult,

ficult, perhaps, to describe the result of such an heterogeneous compound. Would it be a *legal*, or an *equitable, estate tail*? The first it could not be; the *legal inheritance* not being included in it; neither could it be the latter, as it would include the *legal freehold*.

From these consequences, I think an opinion may reasonably be formed, that two such discordant estates are not to be considered as capable of the union requisite to form one estate in the ancestor, within the rule in *Shelley's case*; and, consequently, that the heirs male, in the above case, will, in default of appointment by *A.*, take by way of purchase, and not by descent.

THAT

THAT in the following case, *a legal estate, pur autre vie*, devised to trustees, will not prevent the union of *a limitation to one for life*, with a *remainder to the heirs of her body*, within the rule in *Shelley's case*, 1 Co. 93. b.

A., by his will, devises unto B. and C. all his lands at D., to hold the same unto the use of the said B. and C., and the survivor of them, in trust, for his wife E., for her life; and, from and after her death, he gave the same to his daughter F., to hold to her for her life, under the trust aforesaid; and, after her death, he gave the same to the husband of F., for life; and, after his decease, he gave the same to the heir male; and, in default of such, to the heiresses of the body of the said F., to be begotten, and to the heirs of the body or bodies of such heirs, for ever; and, in default of such issue, his will was, that the lands should return to the use and behoof of his two nephews G. and H., and their respective heirs, for ever.

THERE

THERE are some peculiarities in this case, which may render it the subject of different opinions. I rather think, that *F.* is *tenant in tail*, under the above stated devise, considering the subsequent limitation to the heir male; and, in default of such, to the heiresses (*i. e.* heirs female) of her body, as uniting with the preceding freehold limited to her for life.

The legal freehold, limited in the first instance to the trustees, and the survivor of them, may be urged as an obstacle to such an union; and so I should consider it, if such freehold were confined to the life of *F.*; for, in that case, her estate for life would be merely *equitable*, and the limitation to the heir male, &c. a *legal estate*; but the limitation to the trustees, and the survivor, not being confined to her life, is a freehold *pur autre vie*, equally affecting the estate limited to her for life, as that limited to the heirs of her body, and does not separate the one from the other; so that *both limitations* being equally subject to it, I apprehend it creates no difference in their qualities, nor consequently prevents their union.

As to the requisite parties for making a tenant to the præcipe, I think, if the trustees, or either of them, are now living, a recovery, without their or his concurrence, would be very precarious, and liable to objection, considering the *legal freehold* as vested in them or him, under the first limitation to the use of them, and the survivor, and the *inheritance* in *F.* being a legal estate.

It is true, the estate is afterwards devised to the daughter, "*from and after the decease of the wife;*" and if that were to be deemed a determination or limitation of the estate before given to the trustees, and a new devise of the *legal estate* to the daughter, the trustees would now be out of the question, and *F.* alone might make a legal tenant to the præcipe; but such a supposition, I rather think, is not to be relied on; and that the legal estate is to be considered in the trustees, or the survivor, if they, or either of them, be living; and in that case, as they cannot be advised, or reasonably desired, to concur in any act that may tend to bar the issue of *F.*, I think the securest way will be, for her to levy a fine, and procure a conveyance of the remainder in fee from the testator's nephews, which, I incline to think, will acquire the title to the whole fee, considering her as tenant in tail, agreeable to my opinion; but if the trustees be both dead, then, I conceive, such a fine by her, accompanied with a

proper conveyance of the fee by the testator's nephews, will bar her issue, and acquire the fee, whether the limitation to the heir male, &c. be considered as giving her an estate tail, or as a remainder to such heir, &c. by purchase; for, taking it as a *remainder*, it is *contingent*, and will be destroyed by her fine, there being, if the trustees are both dead, no subsisting estate to support it.

THAT

THAT a limitation to the heirs of the body does not unite with a contingent freehold in the ancestor, within the rule in *Shelley's case*, 1 Co. 93. b., where both limitations are not made to depend on the same contingency.

By indentures of lease and release of 1729, fee simple lands are limited to the use of trustees, and their heirs, in trust, after the marriage, for *D.*, for life; remainder to *E.*, the mother and intended wife, for life; and, after the decease of the survivor of them, to *E.* the daughter, in case she should be then living, and to such other children of the said *E.* the mother, by the said *D.*, or any after-taken husband, for life; and to the children of the said *D.*, which he had by a former wife, as should be living at the time of the decease of the survivor of the said *D.*, and *E.* the mother; then to the heirs of the body of the said *E.* the daughter, and their heirs, for ever, as joint tenants: and not as tenants in common: but if the said *E.* the daughter, and all such children,

B F 2

should

should happen to die in the lifetime of the said *D.*, and *E.* the mother, or either of them, then in trust for *D.*, and *E.* the mother, and the survivor of them, for ever.

D. died without issue by *E.* the mother; she afterwards married *F.*, by whom she had three children. *F.*, his wife, and *E.* the daughter, in 1744, levied a fine of the lands, and declared other uses. *F.* and his wife are dead, and also two of their children. *E.* the daughter is dead, leaving two sons and two daughters.

A DECIDED opinion on the construction of limitations, so irregular as the present, cannot reasonably be expected; but, upon the whole, I incline to the construction adopted by Mr. — as the most probable, because I think the best founded.

In forming an opinion on the effect of the limitation to the heirs of the body of *E.* the daughter,

daughter, &c. I think we must treat that limitation as if unattended with the subjoined words, *and their heirs, for ever, as joint tenants, and not as tenants in common*; because the latter words, if admitted to have any influence in the construction, would, I conceive, only render the limitation to the heirs, &c. ineffectual and void, from their denoting a mode of tenure totally incompatible with, and inapplicable to, the nature of a limitation to the *heirs of the body*, in its proper technical sense, to which I consider the words as strictly confined, in the case of a deed, without admitting of any explanation into children or issue, as they might in a will. And, therefore, *ut res magis valeat*, I apprehend, the latter repugnant words are to be rejected.

Now, taking the limitation as detached from those subsequent words, the question arises, Whether it attached in the ancestor, so as to give her an *estate tail*, according to the rule in *Shelley's* case, or operated as words of purchase, to the heirs of the body? It rather appears to me, that they operated as words of purchase to the heirs of the body of *E.* the daughter, and not as words of limitation of estate to herself; not because the preceding limitation to her for life was not a sole estate to her in the whole of the lands, or the estate so limited to her was not

certain, but contingent; for I conceive, that a limitation to two or more, for their lives, remainder to the heirs or heir of the body of one, gives the inheritance *in the whole to that one*, subject to the joint estate for life of the other. And where the estate for life is contingent, if the subsequent limitation to the heirs be decidedly restrained to the same *contingency*, I see nothing to prevent their constructive original union. But I can discover nothing in the present case to confine the effect of the limitation to *the heirs of the body* of *E.* the daughter, to the same *contingency or event*, as the preceding estate to herself is made to depend on, *viz.* surviving her mother and *D.* And where the ancestor's estate for life is contingent, and that to the heirs, &c. is limited, *independent of that contingency*, I do not see how they are to consolidate, without, in effect, making a material alteration in the nature of one of them, by either discharging the ancestor's estate for life from the contingency to which it was confined by the limitation, or connecting the limitation to the heirs with, and making it dependent on, *the same contingency*. For, admitting the *union*, the heirs can only claim under or through the ancestor; and, consequently, only in that event in which the ancestor either actually did, or at least might have taken the freehold. And therefore, as the limitation to the heirs of the
body

body of *E.* the daughter, does not appear to me to have been restrained to the same contingency as her own estate for life expressly was, I rather think it operated as a remainder to such heir, by purchase, and accordingly vested in her son in tail, in remainder expectant on the preceding estates limited by the same settlement to the children of *F.*

The limitation to *E.* the daughter, and to the other *future children* of *F.*, is expressly confined to estates *for life*. And, therefore, as I do not consider the subsequent limitation to the heirs of the body of *E.* the daughter as enlarging her estate, it appears to me, that she, and the said future children, could take only estates for life, under the limitation in the settlement of 1729. And, as there are no words to sever the jointure regularly imported in a limitation to several, I apprehend, they must have taken as joint tenants, if there had been more than one to take; but, I understand, from the copies of the bill and answer left with this case, that *G.* was the only child that survived *F.*

From what I have said in my answer to the preceding queries, my opinion follows, that *G.*, the only surviving child of *E.* the mother, by her husband *F.*, is tenant for life of the whole of

the settled estate; and I cannot say I think her entitled to any greater estate or interest therein; for, as to the settlement and fine of 1744, that, I conceive, could not alter or affect the title beyond the interests of the parties thereto. The legal estate appears to have been in the trustees, under the settlement of 1729; therefore the fine of 1744 could not bar the contingent remainders limited by the settlement of 1729; and though five years and more have elapsed since that fine, yet, as the title of the heir of the body of *E.* the daughter, to the possession, under the settlement of 1729, could not commence till the decease of *F.*'s surviving child, such heir could not be bound to enter, nor any non-claim on the fine commence against him, till after the decease of such child, namely, *G.*

I have observed, that *G.* appears to me entitled to no greater estate or interest than for her life. To entitle her to an estate tail, I conceive, it would be necessary to maintain one or other of the following propositions, *viz.* Either that the limitation in the settlement of 1729, to the heirs of the body of *E.* the daughter, was confined to the same contingency as her own estate for life, and so united with it, as to give her a contingent estate tail that capacitated her to bar her issue by fine; a construction

struction for which the words of that limitation do not seem to me to afford sufficient ground. Or, that the then unborn children of *F.* could not take less estates than of inheritance; a supposition which, however heretofore countenanced by some opinions, seems entirely excluded at this day; vide *Hay v. Earl of Coventry*, 3 *Durnford and East*, 83. Or else, that the limitation of a remainder for life to an unborn person is good; yet any ulterior limitation after it is void, as too remote; for which, however, I am not apprised of any due authority.

It is true, that a remainder to the child of an unborn child would be void, as involving a possibility upon a possibility; but that principle does not seem to apply to a limitation over to a person *in esse*, or one to come *in esse*, by the expiration of a life in being; and though I think, that any limitation after the decease of a person unborn, not preceded by any other estate, would be void, as exceeding any limits hitherto allowed for executory devises, or future or springing uses or trusts, yet I do not know of any decision that impeaches the validity of a limitation in remainder, after preceding estates, capable of supporting it as such, merely on the ground of its following a limitation for life to an unborn person. I am
aware,

aware, that some entertain their doubts upon it; but, I think, the cases which affirm the validity of the particular estates, establish that of the remainders after. This, however, I suppose, will be made a point in the arguments on the part of G., whenever the right to the inheritance comes to be discussed.

THAT

THAT the following devise of an equitable estate to *B.* for life; and, after her decease, to the heirs of her body, may probably be taken out of the rule in *Shelley's* case, 1 Co. 93. b., by the declaration, that she is to have the rents and profits for her own proper use, without the intermeddling of any husband.

A., by his will, says, “ and for the better provision and maintenance of my daughter, for
“ and during her life, and for the heirs of her
“ body, for the estates and uses hereinafter
“ mentioned, I give and devise unto *C.* and *D.*,
“ and their heirs, all my lands at *E.*, upon
“ trust, that they, and the survivor, and his
“ heirs, shall and do permit and suffer my
“ said daughter *B.*, from and after her attainment of twenty-one years, or day of marriage, which shall first happen, to receive and
“ take, to her own profit, use, and behoof,
“ without the intermeddling of any husband,
“ all the yearly rents thereof, for and during
“ her natural life; and, after her decease, I
“ give and devise the same unto the heirs of
“ the

“ the body of my said daughter, lawfully to
“ be begotten, and to their right heirs, for
“ ever ; but, in case it should happen, that
“ my said daughter should die before twenty-
“ one years of age, and without issue, then I
“ give the said lands to F., and his heirs,
“ for ever.”

B., married when of age, and her husband is
dead, leaving several children, and the eldest
son of age.

THIS case involves some difficulty. Had the
limitation been simply in trust for the daughter,
during her life, and afterwards for the heirs of
her body, it would have fallen within the ge-
neral rule in *Skelley's* case, and the daughter
would have taken an estate tail. But here the
trust is to permit her to receive and take the
profits for her own use, separate and apart from
any husband, and over which he was to have no
power ; and, *after her decease*, the lands are de-
vised to *the heirs of her body* ; so that the testa-
tor clearly meant to exclude the husband from
all benefit of the estate, either in his wife's
lifetime, or afterwards ; which intent could not

be answered by the construction of an *estate tail*, for that would have entitled the husband to be tenant by the *courtesy*, had he survived his wife.

This was the ground of the decision of Lord *Hardwick*, in the case of *Roberts and Dixwell*, 1 *Atk.* 607., which, in respect of limitation, did not much differ from the present; only, that was the case of a trust *executory*, and a conveyance to be made under the direction of the court. However, as all trusts are subject to the direction of the court, and to be effectuated according to the intention, without a strict adherence to certain rules that prevail in devises of legal estates, the circumstances which were thought sufficient to prevent the court from directing an estate tail in the case cited, may operate to prevent the construction of an estate tail in this, which is also the case of a *trust*; and here the superadded words of limitation to the heirs of the body, viz. *and their right heirs, for ever*, still further manifest the intent, that such heirs should take *the inheritance by purchase*; and though this circumstance would not avail in the devise of the *legal estate*, yet it may have its weight in influencing the construction in the case of a devise *in trust*, as the present appears to be.

Upon

Upon the whole, I think it a very questionable case; but, for the reasons above noticed, I rather incline to suppose *B.* may be construed to take only an estate for life, with remainder to the heirs of her body, *by purchase*; if so, she cannot, without the concurrence of her son, by recovery, or otherwise, enable herself to sell or dispose by will of the lands so devised.

THAT

THAT a limitation to the heirs female of *B.*, lawfully to be begotten, as tenants in common, after previous limitations to *B.*, for life; remainder to trustees, during her life, to support contingent remainders; remainder to her first and other sons successively, in tail male, gives an estate tail to the daughters of *B.*

UPON my perusal of the above case, and the copy of the will left therewith, it appears to me, that *B.* took an estate for her life; remainder to trustees, during her life, to support contingent remainders; remainder to her first and other sons successively, in tail male; remainder to the heirs female of her body lawfully to be begotten, as tenants in common; with remainders over in fee. The effect of these limitations, antecedent to that to the heirs female of *B.*, is clear. But that limitation is the subject of question;

tion; which question may be, Whether it operates as words of limitation, and vests an estate tail in *B.*? or, if it operates as words of purchase, what is to be its object? whether the person who shall be heir female of the body of *B.*, at the time of her decease, or her issue female; that is, daughters? Now, I conceive this limitation to the heirs female, being to them as tenants in common, clearly prevents its operating, as words of limitation, to vest in *B.*; for, in that case, her heirs female would take, not as tenants in common, but as coparceners.

This takes it out of the rule in *Shelley's* case, and lays us under the necessity of considering these words as words of purchase. Then, if we construe them strictly, as meaning the persons who shall be heirs female of the body of *B.*, the consequence will be, that a daughter or daughters of a deceased son, would, in that case, take prior to, and in exclusion of, *B.'s* own daughters, which would be contrary to the intention of the testator, manifested in his confining the limitation, to first and other sons, to their *heirs male*; for, if he had intended their issue female should take next to their issue male, he would have limited them estates in tail general, or else have given them remainders in tail female. I therefore incline to the opinion, that
by

by heirs female, the testator must be understood to mean daughters. And, though words of limitation, in that case, are wanting to limit the inheritance to the daughters, I conceive the word *remainder* would carry the inheritance; and the implication arising from the subsequent limitation of the remainder in fee, and the declaration afterwards, that in case the testator's brother should die without issue male, or his sister without issue male or *female*, that the lands should go over, will confine the remainder to the daughters to an estate tail in them, with cross remainders among them. And therefore, upon the whole, I incline to the opinion, that *B.* is tenant for life; remainder to her first and other sons successively, in tail male; remainder to her daughters in tail; though I think the latter point is open to controversy and different opinions.

But however this limitation to the heirs female may be construed, I think it clear it must be as words of *purchase*. And whether it be to the daughters, or to the heirs female, in the strict sense of the words, yet as it is supported by an estate limited to the trustees, during *B.*'s life, to preserve contingent remainders, she cannot bar it, any more than the limitation to her first and other sons; and therefore cannot, by recovery, or otherwise, make a title as against her own issue.

But another question may arise upon the operation of that clause in the will, whereby the testator declares his intention, that in case his brother *G. B.* should die without issue male, and his sister *J.* should die without issue male or female; whether these latter words will not create an estate tail general in *B.*, in remainder expectant on the limitations to her sons and heirs female, in order to let in the daughter of a son, if the heirs female be construed to mean daughters of *B.*; or to let in *B.*'s daughters, in case the heirs female should be construed strictly according to the words, and *B.* should happen to leave daughters, as well as a daughter, of a deceased son? for the words, issue male or female, in common acceptation, include all issue, and are equivalent to issue generally; and therefore, in the clause last noticed, seem to manifest the testator's intent, that the estates should not go over whilst *B.* left any issue at all; and therefore may, perhaps, be considered as raising by implication a remainder in tail to her, to supply the defect of the preceding limitations to answer such intent; as in the case of *Sutton and Payman*, and the Attorney-General, 1 *P. Wms.* 753. If so, *B.* might, by a recovery, bar such estate tail, and the remainder or reversion thereon expectant or depending, though she could not bar her sons, and their issue, or the persons taking under the description of her heirs female, under the antecedent limitation; these being all prior

to such implied remainder. But this question, however, seems not so material to the present inquiry, as the said limitations to her sons, and to her heirs female, put it out of her power to acquire an absolute dominion over the estate, so as to enable her to make an absolute title thereof to a purchaser or mortgagee.

THAT the words, *heirs of the body of the wife by the husband*, in marriage settlements of personal estate, after a previous limitation to her for life, are words of purchase.

X., a mortgagee, by the direction of B. C. the proprietor, in consideration of the mortgage money received of the father of D., and of an intended marriage between B. C. and D., and for making some provision for the said D., and the issue she might have by the said B. C., in case such marriage took effect, assigns leasehold lands to trustees, their executors, administrators, and assigns, for the residue of the terms, in trust, after the marriage, to permit B. C. to receive the rents and profits for his life; then to permit D. to receive the same for her life; then for the heirs of the body of the said D., by the said B. C. to be begotten, for the remainder of the said terms; and, in default of such issue, remainder to the executors and administrators of the said B. C.

THIS

THIS is a case of doubtful construction, on account of the different decisions that appear to have been on these sort of limitations in marriage settlements; for, in some cases, they have been held to be words of *purchase*, and to vest in the issue accordingly, contrary to the general rule, that a limitation of personal property to one for life, remainder to the *heirs of his body*, vests the whole in him; whilst in others they have been considered as within the general rule, and to operate as words of *limitation*, for the benefit of the ancestor.

Thus, in the cases of *Peacock* and *Spooner*, 2 Vern. 43. 195. 2 Freem. 114., and *Dafforne v. Goodman*, 2 Vern. 362. 2 Freem. 231., where terms were limited in trust for the husband and wife for their lives; and, after their deaths, for the *heirs of the body of the wife* by the husband, the latter limitation was held to vest in the issue by purchase. But, in a subsequent case of *Webb v. Webb*, 1 P. Wms. 132., where a term was assigned in trust for the husband for life, then for the wife for life, and afterwards for the

heirs of the bodies of the husband and wife, it was determined, that the whole term vested in the husband.

Under the first of these authorities, I apprehend, *B. C.* would now be entitled only to an interest for his life in the lands in question; and the lands, subject to his life interest, would be now absolutely vested in the daughter for the residue of the terms therein. But if this case were to be ruled by that of *Webb and Webb*, then, as the whole terms would have vested in the mother, in remainder expectant on her husband's decease, under the limitation to her for life, and afterwards, to the heirs of her body by her husband; and as such her *chattel interest* must have survived to her husband on her decease, I apprehend he would now have the whole beneficial interest in him during the terms, in exclusion of his daughter, and might dispose thereof as he thought proper. Therefore, the question is, Whether this case is to be ruled by the authority of *Peacock and Spooner*, or that of *Webb v. Webb*? The last of these cases seems to have been the ruling authority in cases of the like general nature; and that of *Peacock v. Spooner*, I understand to be confined to cases exactly *the same in specie* with itself. But the present case appears to be of that description; for here the limitation is to the

the *heirs of the body* of the *wife* by the husband, as in *Peacock and Spooner*, and not to the heirs of the bodies of the *husband and wife*, as in *Webb v. Webb*; which circumstance, of the limitation being to the heir of the body of *the wife*, has been considered as a point of distinction between the two cases; vide 1 *P. Wms.* 135. 2 *Vez.* 660. And the settlement, in this case, appears to have been, in part at least, (that is, so far as the value of the lands exceeded the portion of 200*l.*), *ex provisione viri*, as that of *Peacock and Spooner*.

Besides, here is, in this settlement, an express argument of intention to direct the construction, as the consideration of the settlement is stated to be, for making some provision for the wife, *and the issue which she might have by the husband*; which intent would be frustrated entirely by considering the words, *heirs of the body*, in this case, as words of *limitation*. And wherever, in the trusts of a term, or other personal estate, there is any clear expression of intention, that the words, *heirs of the body*, after a limitation to the ancestor for life, shall be words of purchase, it seems, the ancestor takes only for life, and his heirs by purchase (vide *Hodgeson v. Busssey*, 2 *Atk.* 89., among other authorities). I therefore incline to the opinion, that, in this case, the words, *heirs of the body*, must be considered

as words of *purchase* ; and, consequently, that *B.* is now entitled only for his life ; and that, subject to such his life interest, the equitable estate in the lands is now vested in his daughter for the residue of the terms therein, as heir of the body of her mother by him.

THAT

THAT where a limitation of a term to one for life, and afterwards to the heirs of his body, be accompanied by circumstances or expressions indicating an intention, that the whole term should not vest in the devisee, the construction will be governed by such circumstances or expressions.

A. B., possessed of an estate for the residue of a long term of years, says, in his will, "I give unto my cousin *C.* my leasehold estate, during his life; and, after his decease, I give the same to the heirs of his body, for the residue of the term that shall be then to come; and, for want of such issue, I give the same, after the decease of the said *C.*, unto *D. E.*, and her heirs, for the residue of the term."

C. entered on the estate, had four sons, and died. His eldest son died in the lifetime of *C.*, leaving a son him surviving, who, after the death of *C.*, took possession of the lands, and assigned them to *H.* and his wife.

THOUGH,

THOUGH, in general, a limitation of a *term* to one for life, and afterwards to the *heirs of his body*, vests the whole in the first devisee, when that limitation is not attended with other expressions or circumstances to prevent such a construction; yet courts have generally attended to any expressions that might warrant the construing the limitation as *distinct*, and make the latter operate as words of purchase; see the cases of *Hedgefon v. Buffey*, 2 *Atk.* 89., and *Read v. Snell*, 2 *Atk.* 642., and other cases. Now, in the present case, the limitation, after the decease of C., to the heirs of his body, for the *RESIDUE of the term* that shall be THEN TO COME, and the limitation over, in default of such issue, to D. E., after his decease, appear to me sufficient for that purpose; the former giving a separate interest from that before given to the father, *viz.* the *residue of the term after his decease*; and, consequently, excluding the construction of that residue vesting in the father; and the latter importing, that the interest limited to the *heirs of his body*, should not vest till his decease, and should then vest in such heir; or, in default of such, then in D. E.; see the opinion of Lord

Macclesfield, and the Lords Commissioners, on the effect of similar words, in the case of *Paine and Stratton*, cited by Lord *Hardwicke*, 2 *Atk.* 647. I am, therefore, of opinion, that the limitation to the heirs of the body of *C.* did not vest till his decease, and then vested in the person who was heir of his body, as the person described; for, though the words, *heirs of the body*, in these cases, may, under particular circumstances manifesting such an intention, be construed as *descriptio personæ*, applicable to an heir apparent, or to children, though not answering the complete description of heir; yet I have not met with any instance of that sort, where there has been no expression or circumstance in the will importing such an intention. Here are none that I discover. On the contrary, the limitation over *after his decease*, in default of such issue, (that is, *heirs of his body*, to which he refers,) shews that he meant, *by heirs of his body*, a person or persons answering that description at the decease of *C.*, which entirely excludes the construction that Lord *Hardwicke* seemed to countenance, in the case of *Thubridge and Kilburne*, 2 *Vez.* 236., that where, in these cases, the words, *heirs of the body*, are taken as words of purchase, it is not necessary that the issue should survive the first taker, so as in strictness to be heir; for here it was necessary, because the residue of the term was, *after his decease*, to vest in *D. E.*, for want of such heir; and, consequently,
only

only to vest in an heir surviving him; that is, an heir of his body in *strictness*. I am, therefore, of opinion, that the residue of the term, on the decease of C., became vested in his grandson G., as heir of his body; and, consequently, that, under him, H. and his wife are now entitled, according to the deduction of the title stated in the above case, and may, by a common assignment of the lands for the now residue of the said term, make a title thereto accordingly, subject to the objection arising from the want of the original lease and title deeds, which, unless there is sufficient evidence without them of the title, as against the representatives of the original lessor, I think essential to a good and clear marketable title.

UPON a similar subject to that on which the preceding opinion was given.

IF a term be limited in trust for *one for life*, and afterwards for the *heirs of his body*, the latter words are generally considered as words of *limitation*, and the whole vests in the first devisee, though the decision was otherwise in *Peacock* and *Spooner*, 2 *Vern.* 43. and 195., and *Dafforne v. Goodman*, *ibid.* 362. However, the subsequent case of *Webb v. Webb*, *ibid.* 668., was decided according to the general rule, and seems to have been the ruling authority since in cases of the like nature; that of *Peacock* and *Spooner* being only followed in cases exactly the *same in specie* with itself. But though the general rule is as I have mentioned, yet it is subject to be controlled by any circumstances or expressions in the limitation of the trusts, clearly manifesting the intention that the words, *heirs of the body*, should operate as words of purchase; vide *Hodgeson v. Bussey*, 2 *Ask.* 89., and *Read v. Snell*, *ibid.* 642., both which proceeded

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ed on expressions which were held to evidence the intention. Now, in the present case, I observe two circumstances that I think are much stronger evidence of such an intention, than any that occurred in either of the cases I have cited. The first is the *trust*, after the decease of the father and mother, for *raising portions for younger children* out of the lands, which, I conceive, implies the intention that the *eldest son* should *have the lands*, and not the father; for we cannot suppose that the parents would have provided such portions for *younger children*, in exclusion of the eldest son, without intending the *lands themselves* as an equally *secure provision* for such *eldest son*; and that end could not be answered by construing the words, *beirs of the body*, as words of limitation, to vest the whole in the father. Secondly, the express limitation of the term, to the *executors, administrators, and assigns of the father, for want of such issue*; that is, *beirs of the body of the father by his wife*, to whom the residue of the term had been *before limited*, after both their deceases. This clearly implies, that the *representatives* of the father were *not to be entitled*, if there were *any such issue*: The term was given to the *beirs of the body, if any; if none*, then to the *representatives of the father*: Such representatives, therefore, were intended to take only in the *latter event*, and not under the alternative contrary limitation to the *beirs of the body*. From these circumstances of apparent intention, I cannot help

help inclining to the opinion, that the limitation to the *heirs of the body* did not operate as words of *limitation*, for the benefit of the father, but vested in the *eldest son*, by purchase; and that he became entitled to the whole residue of the term, after the decease of his parents, subject to the mortgage, and to his brother's and sister's portions; and, consequently, had a right to dispose thereof by his will; and that his brother is now entitled thereto accordingly under his will. That the description of heirs of the body was not meant to *include the younger children*, I think appears from the *portions* provided for them in exclusion of the eldest son upon the same lands.

ANOTHER in support of the same doctrine, even where chattels are limited to one for life, and afterwards to his *heirs* (generally): Also, that circumstances or expressions of restrictive intention will rule the construction equally where *descendible freeholds*, or *estates pur autre vie*, are the subjects of such limitations.

I RATHER apprehend, that the doubt which is stated in this case, cannot be satisfactorily resolved by any private opinion, unless founded upon a *case decided in point*, of which I am not apprised. Generally, in case of a devise of a *term* to one for life, and afterwards to the *heirs of his body*, the latter words are held to operate as *words of limitation*; and to give the cestuique trust the whole interest in such term. From whence I infer, that if the latter limitation be to the *heirs* of such devisee, or cestuique trust, the same construction will prevail; for the words
of

of limitation in the latter are *more extensive*, and less restrained, in respect to the representation directed thereby, than in the former limitation; and, consequently, import less of *designatio personæ* to take by purchase. But though I take this to be the construction, in cases of such limitations of terms *generally*, without any other *expression or circumstance* in the will expressing the *intent*, that the devisee shall have no greater estate than for life; yet, I conceive, that where it appears from limitations or expressions*, independent of the *limitation to the devisee for life, and to his heirs, &c.* that he shall have only an estate for life, the construction will be ruled by such expressions of intention. Now, in the present case, the limitation over after the decease of *A.*, to such person as he should by his will limit, direct, or give the same, I think, may seem to influence the construction of his taking only an estate for life, and that his *heirs* should take by *purchase*; for this limitation implies, that his power of disposing of the lands, even by will, was to depend on *this very trust*; and, consequently, that he was not to take any more than

* It is to be observed, that the rule in *Shelley's case* does not apply either to *terms for years*, or *estates pur autre vie*, nor, conclusively, even to *trusts of lands of inheritance*, against expressions of intent, that the heir, &c. shall take by *purchase*; much less to *trusts of terms*, or of *estates pur autre vie*.

an estate for life; for, if he did, he might dispose thereof by will, without resort to the power given him by this trust: and that his power of disposition was to be construed to his will; which would not be the case if he were to take the whole interest under the limitation to his heirs. What I have said applies partly to the estates held for terms of years, determinable on lives, being chattel interests, and not the subjects of occupancy. As to the leases for lives absolutely, a limitation of such interests to one and his heirs, or to one and the heirs of his body, puts the whole in the power of the ancestor; though strictly speaking, the words heirs, &c. are not words of limitation enlarging the estate of the ancestor, but words descriptive of a special occupant; and therefore, in a limitation of such estate FOR LIFE, and afterwards to his heirs, or the heirs of his body, as the latter are only descriptive of a special occupant, I apprehend, the same construction would hold, and the estate be equally subject to the disposition of the ancestor to whom the estate is limited for life. But I think, that in a devise of such an estate to a man for life, with a remainder to his heirs, &c. if there are other words expressive of the restriction on the power of the ancestor to dispose of the estate from the heir, the interest of the devisee for life may be construed as limited to his own life; and that the heir shall take the estate afterwards, as if it were a remainder by purchase, not subject to the

disposition

disposition of the devisee for life. Now the clause I have noticed, empowering *A.* to dispose of this estate by will, seems to imply a negative on his power of disposing of it *otherwise* from his heirs; and this being the case, not of a devise of the *legal estate*, but of a *trust* within the discretion of a Court of Chancery to execute, according to the *apparent intent*, makes it a subject of still greater caution.

Upon the whole, therefore, I cannot venture to say, that I think *A.* can make a *satisfactory* title to *either description* of the estates in question; and indeed I do not think it would be proper for either the *legal lessee*, or the *trustees in the will*, to concur with him in any conveyance for that purpose, whilst there remains a doubt as to *A.*'s power of disposition. I think a fine *sur concessit* would destroy his *power of appointment*; and to that he might add a *release of such power*. But I do not know by what means he can make a title *effectually secure* against the claims of *his heir*, viewing the case in the light I have mentioned.

UPON the mode of granting the *next* presentation to an advowson, and that it is doubtful whether it be simony or not, for a father to purchase a next avoidance, with an intent declared to present a son, and afterwards such presentation is made accordingly.

I HAVE perused the above abstract, and, subject to the queries I have made in the margin, which are of a sort, that, I presume, are answered by mere inspection of the deeds, and supposing those deeds correspond with the abstract, and that the presentation has gone according to the title deduced by the abstract, A.'s title to the advowson, which is the subject of inquiry, appears to be well deduced; and, I conceive, that he is competent to make a title to the next presentation contracted for; and such a title, I conceive, may be made by a grant thereof by deed, framed in the usual form, for those purposes, accompanied with proper cove-

nants as to title; quiet enjoyment, &c. accompanied with a bond in sufficient penalty (suppose double the purchase money), for performance of those covenants; and I think it would be advisable to have the title deeds deposited in some trustee's hands, until the next avoidance has been filled up on the presentation of the grantee. It seems regular, that notice of the grant of a next presentation should be given to the bishop of the diocese; but the prudence of so doing depends much on circumstances of confidence in the grantor, and the object of the grantee's intention at the time.

But as to the second point, some doubts arise to me, whether the presentation intended may not be affected by the laws against simony? at least, I am not sufficiently clear upon this point, to venture a positive conclusion to the contrary. My doubts are occasioned by the apparent indecision in our books, in regard to the limits of simony, under circumstances somewhat similar to those that are stated to exist in the present case, and the consequent difficulty in ascertaining on which side of those limits such a case may fall.

That the presentation to an avoidance purchased without any declared intention as to the person so presented is not simony, seems very clear. But it appears to be holden, that if a

person purchases a next avoidance, with an *intention* (declared, I presume,) to present a *certain person*, a subsequent presentation accordingly is simony.

This seems to have been admitted in the case of *Smith v. Sberborne, Moor, 916.*, where the presentee stands in the relation of a stranger, and not of a *son to the purchaser*. But a distinction has been taken between such a case, and where the *father* (of the intended clerk) is the purchaser, for it is there said, the Court agreed, that if a stranger buys the next avoidance, and presents one that is not privy till after, and after is made privy, and *is presented*, it is simony; not so where the *father buys*, because he is bound in nature to provide for his son.

But in a subsequent case of *Kitchin v. Calvert, Lane, 102.*, Baron Suig laid it down, that if *A.* purchases the next avoidance, with intent to present *B.*, and the church becomes void, and *A.* presents *B.*, *this is simony, by averment*; and by good pleading the *presentation of B.* shall be avoided. And in *Wincombe v. Puleston, Noy, 25.*, Hobart, C. J. held, that if in the grant of a next avoidance *it appears*, that it was his *intent to present his son or his kinsman*, and it was done accordingly, this was simony. And again, in *Godbolt, 390.*, it is cited to have been adjudged, that if a man purchases the next avoidance

avoidance of a church, with *an intent to present his son*, and afterwards he *presents* him, this is simony within the statute. And Dr. *Watson*, in cap. 5. of his *Complete Incumbent*, opposes the distinction between a purchase by a *father for his son*, and a purchase by a *stranger*; and says, that the reason supposed of a father's being bound to provide for his son, is not good for the purpose; for a man is bound by nature to provide *for himself*, and so might purchase for himself on the same principle. And, it is well asked, if the purchase of a living, when full, *with intent to present any certain person*, is, as has been held, within the statute, how can it be lawful, as the words are general, for a father to do it. Vide *Bac. Abrid.* v. iv. p. 469. And Dr. *Watson* says, that to avoid all *question at law*, it is best, that a purchaser of a next turn (whether he designs it for son, kinsman, or stranger) make the contract when the incumbent of the church is not in danger of death; that he does *not declare his intention* to the person whom he intends to present; that the intended clerk be *not present* at the contract; however, that he be *not named in the deed* by which the presentation or nomination is granted. Indeed, if the mere avoiding any signification of the intended presentee, in the deed of grant itself, or his not being present at the contract, saves the presentation from simony, then is the difficulty at an end; but this seems hardly reconcilable with

what was laid down by Baron Snig, in the case of *Kitchin v. Calvert* above cited, of simony by *averment*.

Upon the whole, therefore, under this shade of obscurity, in respect to the precise line of simony in *presentation*, in cases apparently running so near its confines as the present seems to do, on account of the *declared intent* of the purchaser to provide for a son, who is, as it were, awaiting the *falling of the provision*, and doubtless *privy to the contract* and intention of his father in it, I cannot venture to say the purchaser will steer clear of the laws against simony in making a presentation under such circumstances. But this merely relates to the propriety of the presentation in view, without any regard to the sufficiency of the title or validity of the contract, if made clear of any simoniacal collusion on the part of the vender.

THAT

THAT a purchase of the perpetuity of an advowson by a clerk, and consequent presentation of himself by his trustee, upon a vacancy happening, is not affected by the 12th *Ann*, stat. 2. c. 12.

I CANNOT say I see any thing to impeach the legality of the purchase by *A. B.* of the perpetuity of the advowson, or his being presented on the next avoidance, by a trustee of his own, to whom he shall have conveyed the advowson, previous to such avoidance. The 12th *Ann*, stat. 2. c. 12., prohibits a clergyman's purchasing the next avoidance, or presentation to any benefice for himself; but I do not apprehend that statute at all affects the case of a purchase of the perpetuity of the advowson, or affects the right of presentation in that case; and, consequently, it appears to me, that if *A. B.*, by deed, grants the advowson to and to the

the use of some person and his heirs, who, by another deed of even date, declares the conveyance to be in trust for the said *A. B.* and his heirs, the said *A. B.* may afterwards, upon the happening of an avoidance, be legally presented by his said trustee,

and it is the opinion of the court, that the said trustee, being a layman, is not bound to present the said *A. B.* to the living of the said parish, but that he may, at his discretion, present any other person to the living, who may be qualified to perform the duties of a parson.

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THAT

THAT the omission of stamps does not affect the legal operation of a deed, further than rendering it unavailable as evidence in any court; and that such defect may be supplied on payment of the duty and penalty.

I HAVE perused the above abstract; and if the title was so circumstanced, at the time of the first abstracted conveyance and recovery by *A. B.*, as to enable him, by such recovery, to acquire the fee, it appears to me, that *C.* may now make a good title to the purchaser of the lands in question; for, as to the validity of the bargain and sale, making the tenant to the præcipe, for the recovery suffered by *C.*, I am of opinion, that if the duty and penalty have been paid, and the receipt or certificate of the commissioners obtained, such bargain and sale is *ab initio* as valid, as if it had been properly stamped before the engrossment of it. Its not having been properly stamped before the inrolment is immaterial, unless

less the want of such stamp affected its operation to pass the estate to the tenant to the præcipe. Now, such stamp was never necessary to this operation or effect, if the stamp laws have not made it so; but the stamp laws do not prevent the intrinsic operation, or legal effect of a deed, but only put a stop to or suspend its being pleaded, or given in evidence in *any court*, or admitted in *any court*, to be good, *useful*, or *available*, until the duty and penalty be paid, and the receipt be given for the same, and the deed be properly stamped. This only affects the use to be made of the deed, its goodness in a court, and the capacity of availing one's self of it there, without rendering the deed itself inoperative or ineffectual, in other respects. It only imposes an incapacity of availing one's self of the operation of the deed till the duty and penalty be paid, &c. without making the deed itself invalid; for the incapacity of availing one's self of the deed, is to cease upon such payment and receipt thereof, which supposes a subsisting and continuing intrinsic validity, good, useful, and available on such payment, though rendered unavailable till then; for if a deed had no validity at all till such payment, it could not be available, as its effect and operation must primarily and substantially depend on its original nature and validity; and it can be only available according to that.

The authority cited, which is in 8 *Mod.* 364., evidently proceeds on this principle; and, on these grounds, the secret mark of the stamp-office, or their entry of the time of annexing the stamp, can create no objection to the title, as they will only shew, that the deed was then rendered available in a court which was not so available before; I am, therefore, of opinion, that the omission of the stamp, in the first instance, is now immaterial, if the proper duty penalty, stamp, and receipt have since been paid and obtained; and, that such bargain and sale is just as effectual as if it had been properly stamped previous to its being engrossed.

THAT

THAT it is prudent for a mortgagee to insist on assignments of outstanding terms to his own trustee.

THE question here put, whether the assignment desired, is *essentially necessary*, seems too strict to admit of a direct positive answer, for the direction of a mortgagee in such case.

A mortgagee is to consider not merely what is strictly and essentially necessary to the title, but what may be *convenient and prudent* for him, as conducive to the facility, as well of informing his security, if requisite, as of finding a ready market for it, when desired. To say, that the assignment required, is *essentially necessary*, would be going too far, as eventually, and not improbably, the want of it might prove no obstacle to the sufficiency and effect of the security. On the other hand, to say that it is not *essentially necessary*, if the mortgagee were to consult that point only, it might lead him into some eventual inconvenience

nience in the enforcing his security, for want of the legal estate, or at least subject him to some difficulty in procuring a purchaser of that security, seeing that the regular course of practice upon these occasions, founded upon a strict and due attention to the security and convenience of mortgagees, constantly calls for assignments of terms of so recent a date outstanding, under the circumstances of those in question, which do not appear ever to have been absolutely assigned in trust to attend the inheritance, but only subject to the mortgages, as they would have done, without any direction at all; and therefore they have never been legally got in from the last mortgagee's trustee.

It is true, those terms could not be set up by the mortgagor himself against the mortgagee in ejectment; but as any other (even subsequent) incumbrancer, without notice of the mortgage, might avail himself of these terms, it seems prudent for the mortgagee to require an assignment of them to his own trustee; and, as constant and regular practice calls for such a step, so that dispensing with it will, in all probability, render his security less marketable, I therefore, without directly answering the very strict question, of whether it is essentially necessary or not, cannot help being of opinion, that it is at least prudent, and consequently advisable for him to insist upon the assignment in question; and, that the proposed
title

title cannot be recommended to him without it, especially as the money to be advanced is of so considerable an amount.

As to the declaration proposed, of all trustees of outstanding terms standing possessed in trust for the mortgagee, it will put the terms no more within his reach than if it were omitted; and he would have an equal claim to the benefit of the terms without as with it; and, therefore, being by no means equivalent to or calculated to supply the place of the regular assignment required, I cannot advise the mortgagee to be satisfied with it in lieu of such assignment.

THAT,

THAT, with certain precautions, a trustee may make a purchase of the trust estate, which will stand a fair chance of being supported in equity.

THE leasehold estate in question, is expressly bequeathed to X., in trust, to sell the same with all convenient speed after the testator's decease, and invest the monies for the maintenance and benefit of the testator's children as therein directed. It follows, that, in order to comply with the said trust, the estate may, and should be sold as soon as can be, notwithstanding the children's minority; for the interest of the purchase money is part of the provision for their maintenance and education during their minority.

The only difficulty, as to a purchaser, arises upon the want of the usual clause to indemnify the purchaser from attention to the application of his purchase money upon the trusts of the will,

an attention to which, I think, he will be liable for want of such clause; and from which he can only be discharged by purchasing under a decree of the court of Chancery.

This attention, however, could be no objection on the part of the *trustee himself*, if he might become the purchaser, as he must, whether, purchaser or not, be equally bound to apply the money upon the trusts, and be responsible for it to the *cestuis que* trust; but, it seems to be a rule in our courts of equity, not to admit of a purchase by a trustee, of any part of a trust estate, to prevent the consequences of fraud, or undue advantage, which the situation of a trustee empowers him to avail himself of, on such an occasion; and, therefore, in the case of *Whelpdale v. Cookson*, 1 Vez. 9., where there was a devise of lands in trust for payment of debts, and the trustee himself purchased part, Lord *Hardwicke* said, he would not allow it to stand good, although another person, being the best bidder, bought it for him at a public sale. I therefore cannot say, that a purchase by X., in this case, would be clear of objection, or obtain him a marketable title.

It is impossible to ascertain the best price, or most money that can be got; the putting the estate up to sale repeatedly, by public auction, after sufficient notice by advertisements, accompanied with a valuation by skilful disinterested persons,

persons, seem to be the best means; and, though I incline to think a purchase at a greater price than shall be offered at such repeated sales, and be estimated as the value by such skilful persons, made by a trustee so nearly related, and in the place of a parent, as it were, to the children, and giving greater price on account of a circumstance of local convenience confined to such trustee, that rendered the estate of more value to him than any body else, would stand a fair chance of being supported in equity; yet, I think, the above objection would hang over the title till the children come of age and confirm it, the legal title indeed would be obtained immediately, but liable to be objected to, and investigated in equity by the children; but, if more than the fair marketable value was so given, it would not be to their interest to impeach it. X., however, must decide whether he chooses to purchase at this risk; that is, of having the purchase impeached by the children, or their representatives. At all events, he will be allowed the money paid by him, and interest for it.

If he chooses to purchase, the assignment may be, by himself, in pursuance of the trust to another person, in the usual manner, for the residue of the term, in consideration of the purchase money paid to X., which money must be immediately invested by him in government, or real securities, upon the trusts in the will. The purchaser

chafer should, by another deed of even date, declare the purchase to be in trust for X.; which deed may recite the sales, and refusal thereto bid at the price put, and the valuation, and the reason of X.'s giving so much more than the valuation. The valuation itself, signed by the persons that made it, should be kept; and X. should retain all the evidence he can of the auction, and what passed there.

THAT

THAT a use is executed under the statute, to answer the apparent intent of the testator, see the case of *Shapland and Smith*, 1 Bro. Cases in Chancery, 75., upon which this opinion was given.

It is a general rule, that a limitation to *the heirs of the body of* a person, after a preceding limitation for life to the same person, in the same conveyance, or instrument, vests in that person, and creates an estate tail, if the limitations are both of the same quality; namely, both *legal* estates, or both *equitable* or *trust* estates; and there be nothing more in the case. But then, there is this difference between their being both *legal*, or both *trust* estates; that, in the former case, even strong expressions of the testator's intention to the contrary, will not controul the rule; while, in the latter case, (*viz.* of their being *trust* estates,) the court of Chancery is so far attentive to the testator's intention, in carrying

that trust into execution, as to deviate from the above rule, in compliance with such intention. See the case of *Bagshaw v. Spencer*, 2 *Ask.* 246, 570. 577, and many other authorities.

It also seems agreed, that a devise to one person in trust for another, without more, is a use executed in that other, for the reasons delivered in the case of *Broughton v. Langley*, 2 *Salk.* 679. But as the statute of uses preceded the statute of wills, the former does not immediately and necessarily extend to the latter; therefore, a devise to one, in trust for another, is not of necessity a use executed in that other, as it would have been in any other conveyance; but, if the nature of the trust calls for the continuance of the legal estate in the first devisee, to effectuate the end of the trust, it seems, the legal estate resides in him. It also appears, by the case of *Broughton v. Langley*, that a devise to one to permit another to receive the rents and profits of land, is tantamount to a devise to one of lands in trust for another; namely, it is a use executed in that other; If there is nothing more in the case. But then, in this case of the *rents and profits*, as in the case of devising the lands themselves to one *in trust* for another, if the nature of the trust requires the legal estate to reside in the first devisee, it stops there, and is not an executed use in the *cestui que* trust. See *Bagshaw v. Spencer*, and *Lady Jones and Lord Say and Seal*, *Vin. Abr.* vol. viii. p. 262. cas. 19,

cas. 19. This latter case also shews, that the legal estate need not continue in the trustees longer than that estate or limitation with which the execution of the trust that calls for the legal estate is commensurate, but is afterwards executed by the statute in the subsequent *cestui que use*.

To apply these principles to the present case, we are to observe, that the devise to the trustees here, is not in trust to permit C. to receive the rents and profits, or the clear surplus thereof; nor is it even upon trust simply to pay such rents and profits; but it is upon trust to pay him by *equal quarterly payments, by and out of the rents and profits*, which prescribes the very mode of payment; and implies, that the fund, *out of which* it should be made, should reside in the hands of the trustees; nor is this all, the payment is to be made after deducting *rates, taxes, repairs, expences, and outgoings*; part of the trust, therefore, is to make this deduction; and seems even to subject the trustees to the taking care, that the estate is kept in repair, and all outgoings regularly discharged during the life of A., so as to render the trustees accountable for the proper performance of such trusts to the persons in remainder; and those trusts could not be performed without their taking the legal estate during A.'s life.

These circumstances appear to me very materially to distinguish this case from that of *Broughton and Langley*; and to bring it within the description of those cases wherein the nature of the trust requires, that the legal estate should pass to, and remain in, the trustees during the life of the first *cestui que* trust; and, as this kind of operative trust extends no further than during the life of A., I see no reason for considering the next limitation, which is to the use of the heirs male of his body, in any other light than as a use executed by the statute.

Now, if this be the case, it will follow, that the limitation in trust, &c. for A., during his life, will not unite or incorporate with that to the heirs male of his body, so as to give him an estate tail; see *Tippin v. Coffin*, *Carth.* 272.; and *Lady Jones* and *Lord Say and Seal*, above cited; and the consequence will be, that this recovery and fine, or either of them, could not bar his issue male, or the remainder over; and, therefore, that the mortgages made by him cannot be good against his issue male, or the remainders over.

I have now stated the light in which the above case strikes me, upon the most attentive, unprejudiced consideration I am able to give it. I wish, indeed, the result of that consideration had proved more consistent with what appears to be the interest, and, of course, the wish of the gentleman

man on whose behalf I am consulted; and, at the same time, had corresponded with the very respectable opinions of — and —*, upon the same case. In truth, a man's opinion, if really founded on his own inquiries and reasonings, is no more the creature of his power than his complexion is. In delivering an opinion, therefore, I often deliver, not what I could wish, but what I cannot help. In the present case, it is with the greatest reluctance I find myself constrained to declare, that I cannot say I think *A.* is capable of making such a title to the whole, or any part, of the estate in question as ought to satisfy a purchaser; or such a one as I should conceive, till convinced by the success of the experiment, a court of equity would compel a purchaser to accept.

* Two gentlemen since dead.

ADDITIONAL observations, upon a suggestion, that the whole might be considered as a trust.

Should it be urged, that the whole legal fee became executed, and vested, in the trustees, (which, however, I think, would be a very unnecessary strain upon the construction,) that construction by making the whole a *trust*, would immediately discharge the devise from the limits of the rule, which, in the cases of legal estates, unites the limitation to the heir male here with the preceding freehold in the ancestor, and leave it to the discretion of the court to carry it into execution, agreeable to the apparent intent of the testator, which appears to be, from the provisions about the expence of repairs, that the estate should be kept in repair by the trustees, during *A.*'s lifetime; and, of course, that he should not be liable to permissive, much less voluntary waste. But the giving him an estate tail, would render this intent abortive; and, therefore, if the court

court should, as it may do, execute the trust pursuant to the apparent intent, *A.* must be considered as tenant for life only. So that, of the only two constructions which the case seems in any degree capable, the one *viz.*, that of the legal estate being in the trustees only during *A.*'s life, and the subsequent limitation, to the heirs of his body, being a use executed, puts a direct negative on the operation of the rule under which the estate tail is contended for; and the other, by taking the case out of the strict controul of that rule, lets in the apparent intent to operate in all its force in determining the construction.

THAT,

THAT, during the contingency of a remainder, the old use rests in the grantor.

B., by lease and release, conveyed lands to the use of *A.* his intended wife, for her life; after the marriage, remainder to the use of *B.* for life; remainder to the use of trustees, and their heirs, during his life; remainder to the use of the first, and other sons of the marriage, in tail male; remainder to daughters in tail general; remainder to the use of the right heirs of the survivor of *A.* and *B.*

B. became bankrupt. The commissioners assigned to the assignees; and they sold and conveyed the lands, by indentures of lease and release, to *D.* and *E.*; who bought in trust for the wife and children. The children all die; and, afterwards, the wife.

If the settlement had been by a *third person*, I think the limitation to the *heirs of the survivor of the husband and wife* would have been a *contingent remainder* to such survivor; and that this *contingent interest of the husband* would have passed by the bargain and sale from the commissioners to the *assignees*; (*vide* the case of *Higden v. Williamson*, 3 P. W. 132., for this point;) it being *an interest in him*, though contingent, and which he was capable of *disposing of by fine at least*; and, I think it appears by the recitals and face of the conveyance from the *assignees*, that it was intended to comprise *all the interest* the bankrupt *had in the lands*, and which the *assignees had* therein, under the *bargain and sale*.

The grant expresses so much, which, I conceive, comprised *his contingent interest*; and, though a fine might have been requisite to *pass such contingent interest* from the *assignees*, I think they must have been considered *as trustees for the purchasers*, of any such interest remaining in them, through the insufficiency of the conveyance to pass it agreeable to the contract and purport of the conveyance.

But, as the settlement was made by *the husband*, who, I conclude, was, at the time, *seised of the land in fee*, it strikes me, that the *ultimate limitation to the right heirs of the survivor of his wife, and himself*, was, so far as it *respected him*, his *old estate*, or the reversion in fee undisposed of from him. For, I take it, a limitation of the *use* to the heirs of the *grantor*, seised in fee at the time, is part of *the old use*; and, that in case of a contingent remainder, the undisposed of fee remains in the grantor, till the contingency happens upon which the remainder is to take effect. And therefore, I rather think, that the limitation in question, so far as it respected the husband, was his old reversion; which *continued vested in him* till the contingency happened, and subject only to be divested on his wife's surviving him, by the contingent use to arise to her *in that event*; and, that this reversion, *so subject*, passed by the bargain and sale to the *assignees*; and, by their lease and release, to D. and E., as a *vested interest*, subject only to be divested on the wife's surviving her husband; and which, of course, became *indefeasible on her death in his lifetime*; and that such reversion is accordingly now *legally vested* in the said D. and E. in trust for the devisee, or real representatives of the person for whom the purchase was made in their names.

THAT

*Case under Lord's Petition
of the House*

THAT a person cannot by will empower himself to make a future disposition of land by another instrument not executed as required by the statute of frauds, 29 *Char.* II. chap. 3. See 5 *Durnford and East*, 92. 2 *Vez.* jun. 206.

I THINK, the first question in this case is, whether the deed poll could operate as a *disposition of the lands*, or any of them; and if so, what was the effect of the disposition, therein contained, to the heirs of the survivor of the trustees; and how far it was originally, or is eventually valid? As to the first point, I rather apprehend, the disposition made by the said deed poll was void, in respect to the *freehold estates*; because, not executed and attested as required by the statute of frauds, to effectuate a testamentary disposition of *real estates*. It may be urged, that the disposition was not *originally* made by that *deed poll*, but by the will to which it refers; and which will refers the disposition to such future deed.

deed. But, I apprehend, a person cannot, *by will*, empower *himself* to make a future disposition of land by another instrument not *executed as required by the said statute*. So far as the disposition of lands, by any will, is incomplete, or left undetermined, (in respect to the testator's own act, and to the degree he intends,) I think, it has no operation at all : the interest undisposed of seems to me still to remain an *estate in lands*, that requires a formal will to pass it, as much as if the whole of the lands had remained undisposed of by the first will. And it seems to make no difference, whether the interest, so undisposed of by the first will, be a *legal estate* in those lands, or a *mere trust* of the legal estate devised to trustees by the first will. For it has been determined, that the *trust of an inheritance* must be devised in the *same manner* as a *legal estate*; because, if the law were otherwise, it would introduce the same inconveniencies, as to frauds and perjuries, as existed before the statute in respect to devises of the *legal estate*. (Vide *Wagstaff v. Wagstaff*, 2 P. W. 258.) And, therefore, it appears to me, that so much of the trust as was undisposed of by the will, in this case, required the same formalities in any future testamentary disposition of it, as it would have done, had it been a *legal estate* undisposed of, instead of a *trust*.

It is true, that a disposition of lands may be made by a writing in the nature of, or purporting
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ing to be, a will, though not executed according to the statute, by virtue of a sufficient power of appointment, under the *uses of a proper conveyance*. But there the disposition is not considered as *testamentary in its origin*, but merely as supplemental to, or directing the operation of, the conveyance from which the power springs. It is, therefore, neither within the statute of wills, nor the statute of frauds and perjuries, respecting wills. But, whenever the disposition is *originally and substantially testamentary*, it is within the said statutes; and every part of such a disposition of lands, whether primary, additional, or supplemental, I apprehend, equally requires the attention to the ceremonies directed by the last statute, to give it validity; for every such supplemental or additional disposition is, *pro tanto*, disposition not made before. I am aware, that a *general charge of legacies on lands*, by a will duly executed, has been held to extend to *legacies afterwards given by a will or codicil not attested to pass lands*; (vide 1 P. W. 423., in the case of *Masters v. Masters*, and 2 Atk. 274., in *Brudenell v. Boughton*;) in which last case, Lord Hardwicke observed, he saw no greater inconvenience than in a man's charging his lands by will with the *payment of his debts*; which would extend to all the debts contracted during his life. But the very arguments used in support of that conclusion negative the supposition of a man's empowering himself, by a will duly executed, after-

wards to make a *further disposition of lands* by a will or instrument *not duly executed* for passing real estates. For admitting this, there could have been no question in respect to the first charge extending to the subsequent legacies, nor any occasion for resorting to authorities, or to the analogy of the charges of debts in support of it.

In the case of legacies, charged on lands, they are considered *primarily as personal*; and the land, by such charge, is only made *a collateral security for them*; as was observed by Lord Hardwicke, in the case last cited, as well as by Lord Cowper in *Hyde v. Hyde*, 1 *Eq. Abr.* 409., who observed, they were not devised *out of land like a rent*, but only *secured by land*, which before was well devised. In fact, such a charge, either of debts or legacies, amounts to no more than making the real, auxiliary to the personal estate; or, in other words, directing it to be *converted into*, and applied as *part of his personal estate*; and in aid thereof *pro tanto*. And as the devise, by a will duly executed, of any part of a man's real estate to be converted into, and considered as personal estate, would entitle *legatees*, claiming under a will *not executed to pass lands*, to the benefit thereof, as part of the personal estate; so, I conceive, must a charge, amounting in fact to an augmentation of the personal estate out of the real, *quoad* the legatees, have a similar operation, according

according to its extent. But a disposition thus completely made, of part of the *real estate, in aid of the personal*, by a will, *duly executed*, is very different from a *testamentary disposition* of part of the real estate, by an instrument, or will *not duly executed*; and any conclusion respecting the extent of the one, therefore, seems no argument for the *validity* of the other.

If a man might, *by a will, duly attested*, devise his lands upon such trusts *as he* should appoint by any other instrument, it would, in effect, amount to a repeal of the statute of frauds, in respect to the solemnities of testamentary dispositions of land. A man would have nothing to do but, on his coming of age, to make one general repeal of that statute, in regard to himself, by devising his whole real estate to some nominal persons, and their heirs, upon such trusts, &c. as the testator should afterwards, by any writing, appoint. And he might, by reference to such repealing will, at any time, make a testamentary disposition of the estates, without the least attention to the ceremonies required by the statute. This would let in all the inconveniencies of frauds and perjuries, intended to be prevented by the last-mentioned statute, in regard to testamentary dispositions of land; nay, the legal abolition might possibly be extended to the statute of wills, as well as that of frauds, &c.; and,

by considering the first indeterminate will, a sufficient compliance, as well with the requisition of *writing* required by one statute, as of the ceremonies of execution by the other, a parol appointment of the trusts might be attempted, under a power worded for that purpose in the original absolving will.

Upon the whole, as I discover no ground for ascertaining the limits of such a derivative testamentary power, either in respect to the quantity or quality of the real estate to which it may be extended, or the nature of the derivative instrument by which it may be executed, nor any solid principles upon which to support it, I cannot help thinking, that the deed poll, in the present case, was void in respect to the *freehold estates*; and, consequently, that after the determination of the beneficial dispositions thereof made by the will, the *trust resulted to the testator's heir at law*, (subject to the prior charges created by the will itself,) as undisposed of by the testator. For though *the legal estate in fee* vested in the trustees by the will, yet it is expressly declared to be *upon trusts* intended to be afterwards appointed; which, I conceive, precluded the trustees from claiming any beneficial interest themselves under the will. And, if the subsequent appointment was void, the survivor of them, and his heirs, could take no benefit under it.

But

But in respect to the *copyholds*, the same objection to the validity of the deed poll does not seem to exist; because, a trust in a copyhold is devisable by a will *unattested*; and so is a legal estate in copyholds, after a surrender to the use of a will. (Vide *Tuffnell v. Page*, 2 Atk. 37.) The present case, I conceive, is the devise of a *trust* of copyholds, there having been a surrender by the testator to the use of trustees, and their heirs, upon the trusts to be mentioned and declared in his will; and the will referring expressly thereto; and the trustees being admitted under it. As to any objection from the want of a *stamp* on the copy of surrender, (supposing the surrender required a stamp, because not within the exceptions of the statute 10 Ann. chap. 19., sec. 100., as not being strictly to the uses of the will,) that omission, I apprehend, did not invalidate the surrender, but only suspended the parties' power of availing themselves of it till they paid the penalty and stamp duty imposed by that act. *Vide* sec. 105. And therefore, I apprehend, that objection is removeable immediately by such payments. Now, considering the legal customary estate as vested in the trustees, by their admittance under their surrender, by relation from that surrender, I conceive, as the beneficial interest was capable of being disposed of by a will *unattested*, it was of course subject to the direction expressed in the *deed poll*, if that be considered as part of the will; which, from the reciprocal re-

ferences betwixt the will and that deed, I conceive it may be, in respect to any dispositions that did not require any further ceremonies than what attended the deed poll; which the devise of the copyholds did not. I therefore am of opinion, that the *beneficial interest* in the copyholds passed according to that deed; which brings me to the question respecting the operation of the limitation, in that deed poll, to the *right heirs of the survivor of the trustees, his heirs and assigns for ever*. This appears to be a devise to the right heirs of the surviving trustee in fee; and, if so, I apprehend, it can give no beneficial interest to such surviving trustee *himself*; as he does not appear to have taken any preceding beneficial estate himself for this limitation to his heirs to unite with. There may, perhaps, be some dispute as to the relation of the pronoun *his*, in this limitation, from being in the *singular number*; and the word *heirs* in the *plural*; which incongruity may suggest the reference of that word *his* to the *survivor* of the trustees. But, considering the indifferent application of the word *heirs* to one or more, as *heir* or *cob heirs*, I do not think there is any great difficulty in the reference of the *singular pronoun*, in this case, to the word *heirs*. The application of it to the *survivor of the trustees* seems to me more difficult, as it will expunge the first part of the limitation, *viz.* to the *heirs of the survivor of the trustees*; for to consider the subsequent limitation to *his heirs*, &c.

as only a repetition of the *first*, will be evidently reducing that *first* to a nullity, and annexing the words of limitation to a person to whom the estate was not given, in lieu of *his heirs*, to whom the estate was *directly given*. I therefore incline to consider it as a *contingent remainder in fee* to the heirs of the survivor of the trustees; and, as such, had it been of the *legal estate of freehold lands*, without any trust estate to support it, I conceive, though originally good, it would have *failed in event*, upon the determination of the preceding estates before it could vest. But, even in freehold lands, I am of opinion, that the *legal estate in the general trustees* would have supported it, and prevented its being destroyed by the determination of the preceding trust estates; according to the authorities of *Chapman v. Blissett, Cas. temp. Talb. 145.* *Hopkins v. Hopkins, ibid. 44.*, and *1 Vez. 268.*, *1 Atk. 581.* And the arguments used by Lord *Hardwicke*, in support of his decision in the place last cited, are applicable to this case. The incumbrances, the discharge of which required the continuance of the legal estate in trustees, and consequently postponed the right of the *cestuique trust* to call for a conveyance of the legal estate to the uses directed by the will and deed poll, are not yet discharged; and this direction in the deed poll is for the trustees, by good and *effectual* conveyances and *assurances*, well and *effectually* to convey and *assure* the real estate remaining *unsold*, (which supposes

the incumbrances discharged, as directed by the will,) according to the limitations therein expressed ; the last of which is, that to the *right heirs of the survivor of his said trustees, his heirs and assigns for ever*. Now, such *effectual assurance*, according to such limitation, called for the insertion of *every trust in such assurance*, that might be requisite *effectually to assure* the estate to such *heirs of such surviving trustee*, pursuant to the said direction. Therefore, if the *cestuique trust* had had a right to call for an assurance, I conceive, it must have been such a one as would effectually have provided for the *preservation of that contingent remainder*. And though, if it had been the case of a limitation of the *legal customary estate* to such uses, I rather think (for reasons unnecessary to be entered into here) that the contingent remainder would have failed, by the regular expiration of the preceding estate, before it could vest ; notwithstanding the legal estate in the Lord would have preserved it from *destruction* by any *precedent tenants for life*, during the continuance of such lives. Yet, under the authorities I have cited, I consider the legal customary estate in the *trustees* as sufficient to *support the contingent remainder* in the copyhold, and prevent its failing by the determination of those preceding trust estates ; and that the trust in the interim, between the determination of those preceding estates, and the said contingent remainders vesting in the *heir of the surviving trustee*, results to

the heir at law of the testator; subject to the subsisting trust for the discharge of the incumbrances created by the will. Upon the whole, therefore, I incline to the opinion, that the surviving trustee has no beneficial interest himself in any of the estates in question; but, that on his decease, *his heir* will be entitled to the *copyholds in fee*; the estate now vested in such surviving trustee being sufficient to support it. And that if he were now compellable to convey the estate, pursuant to the deed poll, it must be in such a manner as to provide for the *effectual assurance*, and, consequently, *preservation* of such contingent remainder.

UPON

UPON the supposed effect of a recovery by the issue, after a fine by the ancestor tenant in tail, in regard to barring reversions and remainders over.

I HAVE perused the draft, and apprehend it is adapted to answer the intent of the parties; but I am to observe, that, notwithstanding the covenant inserted for levying a fine, I think it behoves the purchaser to be cautious of having such fine levied, because I think it a matter of doubt, *at least*, whether, if *A. B.* and his brothers should die after such fine levied, in the lifetime of the lunatic, any of their sons can, by being vouched in a recovery, bar the remainder in fee. Tenant in tail, I know, may, after a fine levied by himself, bar the remainder over, by being vouched in a recovery, because he was entitled, and *tenant in tail* to the lands; and even this point was formerly doubted, though settled now; but, I do not know any instance of its having been done by the issue, after a fine levied by the ancestor; and seeing, that the estate tail

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is barred, and discharged by the fine, by force of the statute, and no right descends to, or ever is in the issue, I do not see upon what principle the vouching of such issue, who never had any estate in, or right to the lands, can have any more effect than the vouching of any other stranger in the world. I have more than once, upon cases of this nature, delivered it as my opinion, that such an expedient was by no means to be relied on; founded upon reasons which I do think necessary to enter into here; but, as I observed, that the agreement upon which the present transaction proceeds, supposed the issue of the tenants in tail capable of completing the title by a recovery, after a fine by their ancestor, in the same manner as the tenants in tail themselves might have done; and, as I am aware that several gentlemen of the profession may be unapprised of the difficulties which appear to me to stand in the way of such a conclusion, I therefore thought it incumbent on me to inform the purchaser of my apprehensions on the matter, that he may use due consideration, and be well advised before he decides upon taking a fine in pursuance of the covenant inserted for that purpose.

THE draft was accordingly laid before another gentleman, who gave it as his opinion, that if the issue of the tenant in tail, who had levied the fine, came in as vouchee, in a common recovery, the remainder over would be barred.

IT then came again before the author, who made the following observations :

THE purchaser could not more effectually have pursued my recommendation to him, to be well advised upon the occasion, than by submitting the matter to Mr. ———*, a gentleman whose abilities, judgment, and candour justly claim every possible attention and respect. I therefore cannot, after the opinion delivered by him on the point, continue to entertain a doubt, without thinking it incumbent on me to enter, pretty explicitly, into the nature of that doubt, and my reasons for it.

* A gentleman who now fills one of the highest offices in the legal department.

That

That tenant in tail, after he has levied a fine (pursuant to the statute) of the intailed lands, and thereby barred his issue, and converted the estate tail into a base fee, may still, by being vouched in a common recovery, bar the remainders, notwithstanding no estate tail is then subsisting, nor any right at all in him to the lands, is, at this day, clear beyond dispute; though it should seem, as is observed by Lord *Hardwicke*, 2 *Atk.* 201., that there was a time when even this was doubted; but that doubt has long since been removed, vide *Barton and Lever*, *Cro. Eliz.* 388., 1 *Roll. Rep.* 223., and Sir *William Jones*, *Rep.* 74. Indeed, without these authorities, I should scarcely hesitate at the conclusion, as flowing directly from the principles I shall have occasion to notice in the sequel of my opinion.

Now, therefore, seeing, that the tenant in tail himself may, after he has levied a fine, still bar the remainders by a subsequent recovery, although he has parted with all the estate and right in the lands from himself and issue, and destroyed the estate tail; and, consequently, that the subsistence or continuance of the estate tail is not an essential requisite to his power of barring the remainders, it may naturally be asked, why the same power does not descend to his issue; and why the nonexistence of the estate tail, at the time, deprives the issue of such power any more than it does the ancestor; and, indeed, if we once admit

admit that there is any such thing as a *scintilla juris*, or *spark of right* remaining in the tenant in tail after a fine levied by him with proclamations, and that such spark of right descends to his issue, it would, I believe, be very difficult to distinguish between the effect of a recovery by the tenant in tail himself, after a fine levied by him, and one suffered by his issue in tail.

This leads to an inquiry upon what grounds or principles it comes to pass, that the vouching of the tenant in tail in a common recovery, after a fine levied by him, bars the remainders, and whether the same principles are equally applicable to the recovery by the issue?

To begin with the supposed *scintilla juris*, or *spark of right*; I know it is an expression that has been made use of upon certain occasions, but I am not apprised of a single decision, relating to the subject of the present inquiry, which has been grounded upon such a supposed principle, nor any one that can be referred to it that will not, I conceive, upon examining the matter, be found to depend on more intelligible principles. It seems very like one of those expressions which are too frequently used to evade rather than inform the understanding.

In the authorities above referred to, for the effect of the recovery by tenant in tail, after a
fine

fine levied by him, there is not a syllable of any *scintilla juris* in the tenant after his fine, nor the most remote allusion to any supposition of that nature. It is, in every one of the places cited, accounted for upon very different grounds, which I shall mention hereafter; nor do I know of any authority for our referring it to such principles.

I am afraid there are very few cases in which it will not appear of too imaginary a complexion to deserve any stress or attention; but, in the present case, I think the statute of fines, 32 *Hob. c. 36.*, contains a direct and express negative upon its admission in any shape or degree: That statute enacts, that all fines levied with proclamations, &c. by any person or persons, of full age of 21 years, of any manors, lands, tenements or hereditaments before the time of the said fine levied, in anywise entailed to the person or persons so levying the same fine, or to any the ancestor or ancestors of the same person or persons in possession, reversion, remainder or in use, shall, immediately after the same levied, engrossed and proclamations made, be adjudged, accepted, deemed and taken, *to all intents and purposes*, a sufficient bar and discharge for ever against the same person and persons, and *their heirs*, claiming the same lands, tenements and hereditaments, or any parcel thereof, only by force of such entail. Now, after this perpetual bar and discharge, *to all intents and purposes*, against the tenant in tail
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and his heirs, can the least spark of right be imagined to remain in any of them, after a fine levied by him, pursuant to the statute? would it not require an imagination stronger than the statute itself to kindle such spark? If this *scintilla juris* be termed a fiction, it may be asked, how a fiction against an act of parliament? Are statutes to be repealed by fictions? Possibly the use sometimes made of the expression *scintilla juris*, upon these occasions, may have arisen from its being first applied to the power which the tenant still retains (upon the principles hereafter mentioned) of barring the remainders by a recovery, after he has parted with all his right, and discharged the estate tail by a fine; and from denoting that power itself, it might afterwards come to be understood as something on which that power depended, and thus gradually become substituted in the place of those very principles of which it was really nothing more than the effect, called by an improper name; and when this impropriety of expression has once led to an idea of a spark of right remaining in the tenant in tail, after a fine levied by him, (according to the statute,) it is natural and reasonable enough to conclude, that it descends in the same plight to his issue; for what should prevent it? But, however, till the enacting clause above cited is repealed, it perhaps would be better to decline entering into any reasons at all for the effect of a recovery after a fine by tenant in tail, than to think

think of accounting for or supporting it, upon the principle of any supposed spark of right remaining unextinguished or undischarged, by the fine.

There is not, as I observed before, in any of the authorities above cited, respecting the operations of a recovery, by tenant in tail, after a fine by him, the mention of, or allusion to any supposed *scintilla juris*, as the reason for the bar, which there certainly would, if any such principle had been acknowledged or attended to, upon these occasions; on the contrary, the case was expressly put by the judges *Hutton* and *Jones*, in a solemn argument in the Exchequer, and not denied by any other of the judges, as an instance of a bar, by a recovery, in a case where no man could possibly say or suppose any right at all subsisted in the tenant in tail.

The reasons laid down, in our books, for the operation of a recovery, by tenant in tail, in barring the estate tail, and the remainders, or reversion thereon depending and expectant, may be distinguished into four.

The first I shall notice, is the recompence in value; vide *Pig. 22.*, which is supposed to be recovered by the tenant in tail against the donor or his heirs, whom he is supposed to vouch, in lieu and stead of the intailed lands recovered

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against the tenant in tail ; which recompence, as it is supposed to go in the same intailed line, and course of descent, as the intailed lands recovered against the tenant in tail would have done, is considered as an equivalent and compensation to the issue, for the intailed lands which such issue was deprived of by the recovery.

This principle equally extended to a recovery suffered (before the statute of fines) after a feoffment, with warranty, or a fine levied by tenant in tail, notwithstanding he had, by such feoffment or fine, parted with the estate entirely, as against himself, because his vouchee, the supposed donor, or his heirs, coming in, and entering into the warranty, tenant in tail had judgment to recover in value against him for the estate tail which he so came in to defend ; and this recompence went to the issue in lieu of the lands lost by the recovery, just in the same manner as it would have done if no feoffment or fine had preceded the recovery by the tenant in tail ; but though the barring the issue is endeavoured to be accounted for, and said to depend on this principle of the supposed recompence ; yet, it is by no means agreed, that the same principle extends or is applicable to the barring the remainders or reversion ; on the contrary, it is denied by several authorities ; vide *Salk.* 569. *Pig.* 21. 1 *Wils.* 73. 1 *Burr.* 115. Indeed, if this principle could be extended to the barring the

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the remainders, as well as the issue; yet, seeing, that the recompence is supposed to come in lieu of the estate lost, and that the tenant or vouchee can be supposed to lose no other estate than what he has, or comes in privy of, it would be necessary, in order to apply it to a recovery by the issue after the fine with proclamations by the ancestor, to consider such issue as coming in of the estate tail; that is, of an estate which he never had any right or claim to, or any concern with in the world, all his privy therewith being entirely precluded by that act which discharged the estate tail before the issue became entitled to it.

This possibly might be attended with some difficulty, which is not, I think, worth our endeavours at obviating; because this principle of the supposed recompence has been so often treated by our courts as an overstrained fiction, inadequate to the purposes for which it is adduced, and therefore rejected by them for other grounds of a different nature, that, I think, we ought to be cautious of any reliance upon it, I shall therefore pass to the next reason assigned by the books, which is particularly applied to the effect of a recovery, as barring the remainders and reversions, which some profess to account for, by telling us, that the recoveror comes in, in continuance of the estate tail; for that the recovery enlarges the estate tail, which, by suppo-

sition of law, has a perpetual continuance; see *Pig. 21.* and the authorities there cited,

This reason is curious, and favours much of legal magic. It is said to have its foundation in the astuteness of the judges; and who but judges could have been so astute may be difficult to say. It certainly proceeds from a depth beyond the reach of common apprehensions; to me, at least, so far from explaining an iota of the matter, it calls for such an explanation itself, as I despair of, to render it intelligible; but whether it be intelligible or not, admitting it to be a reason for the bar to remainders and reversions, effected by the recovery of one who has, or ever had an estate tail, or a right thereto, in the lands recovered, the question remains how we are to apply it to a person who has not, nor ever had any estate tail, or right or claim to one in the lands? which is the case, in respect to the issue in tail, after a fine levied by his ancestor, pursuant to the statute; for, though the law, in favour of the general power of alienation, may allow a person having a limited species of inheritance in lands, by a certain mode of conveyance, to discharge his estate of its limits, and open it into a full and complete title, it does not seem clearly to follow, that the same power shall belong to a person who never had any property, right or claim at all in or to those lands. That the remote interest of a remainder man or reversioner, after an estate tail,

tail, should, for the general purposes of alienation, and the conveniencies thence arising to a commercial society, be subjected, in a certain degree, to the power of the tenant in tail, who has a more immediate, and therefore, in fact, a greater property and interest in the inheritance of the same lands, may not be deemed unreasonable; but, that the property or interest of any man, (as that of the remainder man or reversioner in the intailed lands,) should be subjected, in any degree, to the power of a person, (as the issue in tail after the fine of his ancestor,) who never had any interest or claim in or to those lands, seems to be a proposition that may be open to considerable objections, unless in any particular case, where for general convenience, it may be established by some rule of law.

Here, perhaps it may be urged, that tenant in tail himself, after a fine levied by him, with proclamations, has no property or right left in him of or to the lands; and, therefore, his power to bar the remainders or reversion, after such fine, is liable to the same objections. In answer to this it may be observed, that such tenant in tail does not come under the description of one who never had any estate in, or right to the lands: he once had that degree of estate or title therein to which the power of barring his issue and the remainders was incident; he has barred the first by the fine; and, by the subsequent recovery, he

only proceeds in doing what the fine did not extend to, and what he might have done without the fine; besides, there is a well-known rule in our laws from which the operation of such subsequent recovery, in such case, seems necessarily to result. This rule is the third, in order of the four into which I mean to distinguish the reasons assigned for the effect of a common recovery by tenant in tail; it is this, that wherever a person comes in as vouchee in a common recovery, and enters into the warranty, he is considered as coming in, not merely of the estate which he may then have in the lands, (if any,) but as coming in of (or, in the legal phrase, *in privity of*) *all other estates and rights which he ever had in, or to the same lands*; vide *Salk.* 571., *Pig.* 114. 118., *Brook. Tail Plea*, 32. Upon his engaging in the defence of lands, he is considered, in judgment of law, as doing so to the utmost extent of any right or interest he ever had in those lands; and, consequently, as coming in to such defence in the same manner, and with the same effect as if he were then actually invested with all such estates and rights. The recovery against him is supposed to be commensurate with the greatest estate or right which he is so considered as coming in to defend; and, consequently, as he is supposed to come in of the estate tail which he once had in him, to the same effect as if he were then actually seised thereof, the recovery against him must have the very same operation, and be attended

attended with the same consequences as if he were actually seised of the estate tail at the time. Now, if he were so seised, it is clear the remainders and reversion would be barred; they must, therefore, be equally barred by a recovery in which he is considered in law so seised. This principle, I believe, is universally acknowledged; and it is the only ground noticed by the court in the above cited case of *Lever v. Barton*, as reported by *Croke*, and also by Sir *W. Jones*, in the case put by him, in the places above referred to, for the bar effected by the recovery of the tenant in tail after a fine levied by him; in neither of which cases, as I observed before, is there the most distant suggestion of any idea or supposition of a *scintilla juris*; but the principle of a man's coming in of all the estates and rights which were ever in him, though it applies directly to the tenant in tail himself, does not seem so applicable to the issue after a fine levied by the ancestor, pursuant to the statute, unless we can suppose a man to come in of, or invested with an estate which never was in him, and to which he never had any sort of title or claim in the world. The tenant in tail was once seised of, or entitled to the estate tail; consequently, upon the principle of a man's coming in as vouchee of all estates and rights that he ever had, he comes in of, or is invested with such estate tail; but the case seems very different with the issue, after a fine with proclamations by the ancestor,

such issue never had any right, title or claim to, nor was concerned or interested, in any degree, in the estate tail, that being extinguished; and the issue barred by the ancestor's fine; therefore, the same principle does not apply to him, unless a principle which invests a man with all estates and rights he ever had can be understood to invest him with estates and rights he never had. Could we, indeed, extend the principle of a man's coming in of all estates and rights, &c. so far as to consider him coming in of, and invested with, not only all estates and rights which were ever in him, but also all such as were ever in his ancestors, we might then proceed to apply it to a recovery suffered by the issue after a fine, with proclamations by the ancestor; but I cannot find the rule any where laid down in such an extent. All the authorities I have consulted or have met with upon the matter, go no further than the tenant's coming in of all the estates and rights that were ever in *him*; and, if we reason upon the matter, we may perhaps find some difficulty in considering a man as coming in to defend; and, for that purpose, as invested with any estate that was in his ancestor, to which no right, title or claim ever descended to him. A man may not unreasonably be considered as engaging in the support and defence of a title to the extent of any right, title or claim he ever had to the lands; but it is another thing to suppose him coming in invested with, and engaged to defend
a title

a title to which he had not the least claim or right in the world. If any metaphysical reasons can be framed in support of the latter supposition, they may probably be opposed by arguments of a more intelligible complexion; I am aware indeed, that in a treatise written by *Noy*, intitled the Complete Lawyer, p. 86, 87., it is said, that the scope of a common recovery, with double voucher, is to bar the first vouchee and his heirs, of every such estate as at any time was in the same vouchee, or any of his ancestors whose heir he is of such estate, and all other persons of such right to a reversion or remainder as were thereupon at any time expectant or dependant. Now this rule, *prima facie*, appears applicable to a recovery by the issue in tail after a fine levied by the ancestor; and if, upon examination, it proved so, who would venture upon a conclusion delivered in these general terms, without any authority or reason, unless some decision, established rule or principle could be found to warrant it? This rule has been copied into some late compilations; and I find it adopted by the editor of the last edition of Pigot, in a marginal note, where instead of acknowledging the author of it, he cites three or four authorities that by no means warrant its application further than to the estates or rights which were at any time in the vouchee himself; but, upon attending to this rule as laid down by *Noy*, we shall find he speaks of a recovery whereby the
issue

issue is barred, which, therefore, does not apply to a recovery by the issue after a fine with proclamations by the ancestor, because there no estate tail is barred, as there is none subsisting to be barred : when he speaks of barring such estate as was ever in the ancestor of the vouchee, he not only supposes a recovery whereby such estate is barred, which is not the case where no such estate subsists to be barred, but he says of any of his ancestors *whose heir he is of such estate*. Now, after a fine with proclamations by tenant in tail, no one can be heir of the estate tail, it being destroyed or discharged by the statute ; so that, although a recovery may, whenever it bars an estate tail that ever was in any ancestor of the vouchee whose heir he is of such estate, also bar any remainder or reversion that ever was expectant thereon, it does not follow, that a recovery which does not bar an estate tail that was in the vouchee's ancestor, (as it cannot if no such estate subsists,) and of which estate the vouchee is not heir, (as he cannot be if there is no such estate to descend,) will bar the remainders or reversion which at any time was dependant or expectant on such estate ; and the alternative, *or in any of his ancestors*, seems added in respect to an estate which, though once in any ancestor, has been discontinued by such ancestor ; in which case the estate never was in the issue, but only a *right of action* ; which right is sufficient to give effect and validity to the recovery in which such issue

is vouched. But, that the vouching of the issue in tail, where no right to the estate tail descends, will not bar the remainders or reversion appears from the case stated by *Jenkins*; 251. viz. that if tenant in tail, remainder in fee, is attainted of treason and dies, and the heir of his body is vouched, it does not bar the remainders; because, as the estate tail was forfeited to the king, it never descended to, nor was in the heir, nor any right thereto. Now what is the difference between the descent of the estate tail, or any right thereto, being prevented by the 26 H. 8. c. 13. which makes estates tail forfeitable to the king for treason, or by the statute of fines which deprives the issue thereof as much as the forfeiture for treason does? for it seems there is no corruption of blood to aid in preventing the descent of any *scintilla juris*, or phantom of right in one case any more than in the other, because it has been held, that attainder for treason makes no corruption of blood as to lands intailed; see 3 Co. Rep. 10.; indeed *Jenkins* says further, that a recovery by tenant in tail himself, after attainder for treason, would not bar the remainder; and, therefore, in this respect, the effect of the forfeiture by attainder may be said to differ from the bar by the statute of fines; but this is expressly accounted for on a principle very wide from any supposed right remaining in the one case any more than in the other; for 2 Rolle's Abr., fol. 394., says, that a recovery by tenant in tail, after

after a fine levied by him, bars the remainders, notwithstanding there is no estate tail then subsisting; because, *it is* considered as a *common assurance*; and, that a recovery by him, after attainder, does not bar the remainders; because *it is not* considered as a common assurance. This brings me to the fourth, and indeed, I conceive, most material ground assigned for the effect of a common recovery by tenants in tail, in barring the reversion and remainders, which is its being considered as a common assurance; see 2 *Roll. Abr.* 394., 3 *Co. Rep.* 40., 1 *Wilf.* 73., 1 *Burr.* 115.; that is a mode of alienation or conveyance whereby tenant in tail is enabled to unfetter his estate, and convey a title to the whole fee, discharged of the estate tail, and all remainders and reversions thereon depending or expectant; this is a clear and intelligible principle, and one that almost arises from necessity; from that demand for a circulation of property which seems inseparable from a commercial state.

Now, if we endeavour to apply this principle to the present case, may it not be objected, that the power of making a common assurance of lands seems to imply, that some estate, right or title in or to the subject of that power either does exist, or, some time or other, did exist in the person exercising such power; for how is a person to be considered as making a common assurance of lands who never had any interest therein to assure;

assure ; if such a person can convey or assure any thing therein, it must be the property of another that he so assures, whilst he transfers or departs with nothing from himself. This would be a kind of power which there probably would be some difficulty in persuading a scrupulous enquirer, that it could have its foundation in any principle of justice, reason, or policy. The issue in tail seems to stand exactly in this situation in respect to the intailed lands after his ancestor has aliened them by fine with proclamations ; for, in that case, such issue has not, nor ever had any estate, right or interest at all in the lands ; and if he can make any effectual common assurance of those lands, it must be of the property of some other person therein, he never having had any right or interest therein himself. The case is otherwise with the tenant in tail ; he had that estate and interest in the lands to which the law annexes a power of making a common assurance of the whole fee ; his fine does not amount to such a complete assurance, it goes only part of the way towards it ; therefore, having executed his power of alienation in part only, what is there unreasonable in supposing him capable of supplying the defect ? and completing the assurance by a subsequent recovery ? Why should an incomplete assurance made by any person, prevent his after confirming his own act ? and making his title as complete as the nature of the estate would have capacitated him to do in case he had
never

never made the preceding incomplete assurance ? For, taking the matter simply upon the footing of a common assurance, there is nothing stands in the way of the effect of a recovery by tenant in tail, after a fine levied by him, but a less perfect mode of assurance previously made by himself, which he may therefore be supposed capable of completing by a confirmation, or more perfect mode of assurance when the time arrives at which he would have been capacitated to make a perfect title, if his preceding conveyance were out of the way ; whereas, in the case of the heir in tail after a fine by the ancestor, it is not any preceding assurance of his own which he may be supposed capable of perfecting, but the obstacle is the act of another person so disposing of the land as to prevent the heir having any right or interest therein to make any assurance at all of it. Having thus far explained the nature and reason of my doubts, I would by no means be understood to deliver an opinion upon the point either way ; I cannot help thinking it a matter of much difficulty ; and all that I mean to shew is, that the point does not, for the reasons above expressed, seem to me sufficiently clear to be prudently relied on ; at the same time it is my sincere wish to have my doubts removed, and to see the point established upon clear grounds, which one single adjudication or opinion of a court would do.

If the matter were brought to a legal discussion, it might probably be determined in favour of the recovery by the issue; I think the case of a recovery by the issue in tail, after a fine levied by himself, in the lifetime of his ancestor, might be argued, and dwelt upon in support of the recovery; though I am aware, that upon the ground of a common assurance, that case might be distinguished from the present, as the only objection to the recovery, in that case, would be the preceding imperfect assurance by the *same person*: Perhaps it might also be urged, that though the estate tail has no longer any continuance as between the issue and the conuzee in the ancestor's fine; yet, as between the donor or his heirs and the issue, the warranty may be considered to continue, so as to entitle the issue, upon being vouched in a common recovery, to recover in value against the donor or his heirs, in the same manner as if the estate tail had not been barred; and, for that reason, the remainders may be supposed to be barred as they would if the estate tail had not been barred before; and, upon its being objected that the recompence in value seems to be confined to the issue, and is not the reason for barring the remainders, it might be answered, that however distinct the grounds or reasons for barring the issue and the remainders may be, they are always found so united and concomitant, that there cannot be an instance wherein a recovery by tenant in tail
bars

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without at the same time barring
or *vice versa*; so that whatever
separate reason for either, the reason
the other always accompanies it; and should
it be observed, that the question is not about a
recovery whereby the issue is barred, that having
been previously done by the fine of the ancestor,
the same observation may be applied to the re-
covery of the ancestor himself, after his fine; and
therefore we may extend the proposition to this,
that there cannot be an instance of a recovery by
tenant in tail which would bar the issue, if not
before barred, that will not at the same time bar
the remainders and reversion, if not before
barred; and then, by parity of reasoning, the
like reference may be extended to the recovery
by the issue. This will necessarily lead to the
grounds above noticed for distinguishing be-
tween the recovery of tenant in tail and that by
his issue after a fine by the ancestor; and in op-
position to whatever weight they might have, we
might urge the general inconveniencies of per-
petuities, and the constant spirit and bent of our
laws to avoid and remove them. For, if a re-
covery by issue in tail, after a fine by the an-
cestor, will not bar the remainder or reversion,
such remainder or reversion must continue to
subsist as a future estate or interest, to take effect
in possession upon the remote event of the general
failure of issue of the tenant in tail, incapable of
being barred or destroyed by any means what-
ever;

ever ; and this would be a perpetuity to a degree beyond any thing allowed in all the doctrine of future uses or executory devises.

It is true, that by the common law, before the statute *de donis*, there was a possibility of reverter in the donor and his heirs, upon the failure of issue of the donee ; but then, this possibility was capable of being barred by the donee after issue born ; and should it be answered, that the like perpetuity subsists in most cases of base fees, as a gift to a man so long as another man shall have heirs of his body ; or, as such a tree stands, where the reversion, though a mere possibility, not transferable, is yet incapable of being barred ; I should think it might fairly be answered, that the unremedied continuance of an inconvenience is one of the most extraordinary arguments that can be urged for the support and establishment of another.

But, in short, to recapitulate the substance of what I have been saying, as I cannot find a single case relating or alluding to the effect of a recovery by the issue in tail, after a fine with proclamations levied by the ancestor ; and, as the cases decided, or stated in the books, of a recovery by tenant in tail himself after such fine, do not make any mention of a recovery by the issue, or either expressly or by inference extend any further than to the recovery by tenant in tail

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himself ;

himself; nor contain the most remote allusion to a recovery by the issue; and, as the reasons expressly given for the operation of such recovery by tenant in tail himself, are his coming in, as it is termed, of all estates that were ever in him; and this recovery being a common assurance; neither of which reasons seems clearly to apply to the recovery of one who never had any estate *in him*, or any shadow of right or claim thereto, or any property or interest at all in the lands to convey or make any common assurance of, I cannot venture to consider the point so much out of the reach of dispute and litigation as for a prudent purchaser to rest his title upon it; and, therefore, I cannot help thinking it incumbent on me, in such cases, to procure the concurrence of the person entitled to the next remainder of the inheritance expectant on the failure of the issue of the ancestor in tail, who levied the fine, in making the desired title; and, when such concurrence cannot be obtained, I have no other alternative than to declare to the purchaser my doubts whether the intended operation of a recovery by such issue in tail, after a fine by his ancestor, as a bar to the remainder or reversion, may not be disputed, and of course to caution him against too much reliance on such a step*.

* 1 *Vez.* 253. goes no further than, that tenant in tail *himself* has power of barring the remainders by a recovery after a fine levied by himself; for which point, see the authorities cited in the beginning of these sheets.

FURTHER sentiments upon the same point.

My earnest desire to get rid of all difficulties upon this matter, would not suffer me to rest without a still further discussion of the point in my own mind; and, though I can by no means suppose any spark of right to remain in a tenant in tail or his issue after a fine with proclamations by him, for my reasons given in the former observations on the matter, nor can see how any of the reasons generally laid down for the effect of a recovery by tenant in tail in barring the remainders do clearly apply to the recovery by the issue after a fine with proclamations by the ancestor, nor can find any authority for the effect of such recovery by the issue; yet, after pursuing the arguments which occur to me on both sides to the utmost extent I am capable of, it appears to me, that the effect of such recovery, wherein the issue in tail comes in as vouchee, is capable of being so strongly maintained on two grounds: First, of the warranty entered into by the vouchee of such issue, (the supposed donor or his heirs,) and the judgment thereon for re-

covery in value; because, in the case of an adverse action, the issue in tail, I apprehend, if heir general of the tenant in tail, and, as such, vouched as conussee in the fine of his ancestor, (the tenant in tail,) on the warranty in such fine, might deraign the warranty paramount, and vouch the donor or his heirs; and, upon such donor or his heirs coming in and admitting such warranty, the issue would have judgment to recover in value. Secondly, of the great general inconvenience of perpetuities in a commercial state, and the general bent and spirit of our laws, for that reason, to avoid and remove them, that it is with great pleasure I find occasion to acknowledge, that I now think myself warranted in closing with the opinion, that a recovery wherein the issue in tail is vouched will bar the remainders, notwithstanding the estate tail was before extinguished by the fine of the ancestor and will have its full effect.

When difficulties occur to me on any point upon which I am consulted, I feel it my duty to declare them; but, am never more happy than upon afterwards discovering what appears to me sufficient grounds for dismissing them. It is a pleasure for the attainment of which I never spare any sort of pains.

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